TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 590

HERMAN O. HAGNER AND JULIA C. HAGNER,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 24, 1931

CERTIORARI GRANTED JANUARY 18, 1932

(36,404)

(36,404)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 3, 1932

[fols. a & 1] [Captions omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Criminal. No. 47181

UNITED STATES

vs.

HERMAN O. HAGNER and JULIA C. HAGNER

INDICTMENT—Filed in Open Court Jul. 2, 1928

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of Amreica, in and for the District of Columbia aforesaid, upon their oath, do present:

[fol. 2] That one Herman O. Hagner and one Julia C. Hagner, each late of the District of Columbia aforesaid, hereinafter referred to as the defendants, on, to wit, February 1, 1927, and continuously thereafter to the date of the finding of this indictment, and at the District of Columbia aforesaid, did devise and intend to devise a scheme and artifice to defraud the Merchants' Transfer and Storage Company, a body corporate, out of its money and property, which said scheme and artifice to defraud was in substance as follows: that the said defendants, trading as the Empire Sales Company of Scranton, Pennsylvania, and as the H. O. Hagner Company of Camden, New Jersey, having entered into certain agreements with the Merchants' Transfer and Storage Company, a body corporate as aforesaid, under the terms of which said agreements, the said defendants, trading as the Empire Sales Company and as the H. O. Hagner Company, agreed to sell *to* the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, agreed to buy and become entitled to buy from the said defendants, trading as the Empire Sales Company and as the H. O. Hagner Company, certain open accounts receivable, notes, acceptances, leases, mortgages, contracts and choses in action, all of which are hereinafter designated as "accounts", then belonging to and thereafter to be acquired by the said defendants, trading as the Empire Sales Company and as the H. O. Hagner

Company, as aforesaid, would present to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, divers alleged accounts with divers persons and would falsely pretend and represent to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, that the said accounts so presented by the said defendants to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, were valid and existing accounts and that the said accounts represented amounts due and to become due to them, the said defendants, for goods and merchandise sold and delivered by them, the said defendants, to divers persons as aforesaid; whereas, in truth and in fact, as the said defendants then and there well knew, the said accounts were not and would not be valid and existing accounts and the said accounts did not and would not represent amounts due and to become due to them, the said defendants, for goods and mer- [fol. 3] chandise sold and delivered by them, the said defendants, and the said defendants had not and would not have sold and delivered said goods and merchandise, as represented by said accounts, but that the said false pretenses and representations were made and were to be made by the said defendants for the purpose of inducing the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, to send its money and property to the said defendants, with the intent, on the part of the said defendants to appropriate and convert the same to their own use.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That the said defendants so having devised and intended to devise said scheme and artifice to defraud, for the purpose of executing said scheme and artifice, on, to wit, April 19, 1927, did place and cause to be placed in the Post Office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N. W., Washington, D. C., which said accounts enclosed within the aforesaid envelope were and are of the tenor following, that is to say:

(Here follow photostats of pages 2½a and 2½b)

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

ORDERS TAKEN AND BILL PARTS REPLACEMENT PARTS SALES LEDGER SHIPPING & MERCHANT TAILS

10382

Sold to Hornbeck Bros

Address Forest City Pa

Date 10/6/24 192

				PRICE	DIS	NET
Salesman	Dolan		Terrible			
6	29 x 4 HD	Fabrico	Balloon	9 19		59 7.
10	30 x 3½		Cord	9 92		99 20
10	30 x 3½	S S	Cord	9 99		99 90
6	31 x 4	"	"	13 72		82 32
3	32 x 4	"	"	13 76		41 28
2	33 x 4	"	"	17 31		34 62
						411 12

Not 10 Dolan

RECORD COPY A A Express

B. L. E. C. Scranton, Pa.

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

GENUINE GOODYEAR AND GOODRICH REPLACEMENT PARTS BRAKE LININGS EMPIRE & MURRAY TIRES

10767

Sold to John Luckenbach Date 10/28 1926

Address Clayplant Pa

YOUR ORDER NUMBER	OUR INVOICE NUMBER	SALESMAN	PRICE	DIS	NET
50 Sets 30x3½		Super Special	5 20		2 10 40
50 " "		Regular	4 40		2 20 00
25 " 29x4.40		Special	6 00		1 50 00
					6 30 40
		Less 40 %			2 52 16
					3 78 24
Blue Line (1 Barrels)					

RECORD COPY

R. A. R. Co. (Business Systems) Hamilton, Ohio.

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

GENUINE GOODYEAR AND GOODRICH REPLACEMENT PARTS BRAKE LININGS EMPIRE & MURRAY TIRES

10437

Sold to Keystone Garage Date 10/14 1926

Address Mt Pocono Pa

YOUR ORDER NUMBER	OUR INVOICE NUMBER	SALESMAN	PRICE	DIS	NET
Saleman	5.102	Date Nov 10			
12 30x3½ Clin 02		Cords Nubions	10 50	Net	126 00
6 30x3½		"	12 65		76 10
6 30x3½		Heavy Duty	14.80		88 80
6 29x4.40		Murray Balloons	10 75		64 50
3 33x5		Heavy Duty	31 50		94 50
1 35x5		"	33 50		33 50
100 B. Silver Cabinet					537.50

RECORD COPY

R. A. R. Co. (Business Systems) Hamilton, Ohio.

28-d

28

against the form of the statute in such case made and provided, and against the peace and government of the said United States.

* * * * * * *

Leo A. Rover, Attorney of the United States in and for the District of Columbia.

(Endorsed:) Criminal. No. 47181. United States vs. Herman O. Hagner, Julia C. Hagner. Violation Section 215 U. S. Penal Code. Witnesses: George E. Brill, Ben L. Prince, Frank Batchelor, John Duchnik, Fred L. Canover, [fol. 4] Anna M. Sullivan. A True Bill: Martin R. West, Foreman.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ARRAIGNMENT AND PLEA—January 18, 1930

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, according to their recognizances and by their attorneys Messrs. Vandoren, Rafferty, Rogers and Peckham; whereupon the defendants being arraigned upon the indictment in each of the above entitled cases the reading whereof they specifically waive, plead not guilty to each indictment, and for trial put themselves upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendants are granted leave within ten (10) days to withdraw said pleas and demur to, or move to quash the said indictments, or otherwise plead as they may be advised.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed April 2, 1930

* * * * * * *

Come now the defendants and move the Court to arrest the judgment in the above-entitled cause, and for reasons therefor show to the Court:

1. That this Court has no jurisdiction over the offense charged in each of the counts of the indictment on which the defendants were tried.

[fol. 5] 2. That said indictment, and each of the counts thereof, fails to charge an offense within the jurisdiction of this Court.

3. That defendants were, by the verdict of the jury, found guilty of offenses of which this Court has no jurisdiction.

4. That defendants were, by the verdict of the jury, found guilty of offenses not charged in the indictment, or in any count thereof.

5. The indictment on which defendants were tried shows, on its face, that this Court has no jurisdiction over the offenses, or any of them, charged in the several counts thereof.

6. The indictment on which defendants were tried fails to set forth any offense upon which a valid judgment of conviction could be rendered by this Court.

7. The indictment upon which defendants were tried is so vague, indefinite and uncertain as to be fatally defective.

8. The indictment upon which defendants were tried fails to charge any offense within the jurisdiction of this Court.

9. And for other and further reasons which will be urged upon the argument of this motion.

L. H. Vandoren, Attorney for Defendants.

Service of a copy of the foregoing motion acknowledged this 2nd day of April, 1930.

Leo A. Rover, S., United States Attorney.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT, ETC.—March 28, 1931

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, according to their recognizances and by their attorney Lucien Vandoren, Esquire; and thereupon the defendants' motion for a new trial and motion in arrest of judgment heretofore argued and sub-
[fol. 6] mitted are by the Court overruled, to which action of the Court the defendants by their attorney pray an exception which is noted; and thereupon it is demanded of each defendant what further he or she has to say why the sentence of the law should not be pronounced against them and they say nothing except as they have already said; whereupon it is considered by the Court that for their said offense the said defendants be taken by the Superintendent of the Washington Asylum and Jail, to said Asylum and Jail, thence to the Penitentiary, as designated by the Attorney General of the United States, there each to be imprisoned for the period of five (5) years and to pay a fine of one thousand ($1,000.00) dollars on each count of the indictment, said sentences by counts to run concurrently and to take effect from and including date of arrival of said defendants at said Penitentiary; and thereupon the defendants by their attorney note an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs on appeal at One Hundred Dollars or Fifty Dollars in cash; whereupon the defendants are committed to the Washington Asylum and Jail.

MEMORANDUM

March 30, 1931—$50 deposited in lieu of bond on appeal.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed April 1, 1931

* * * * * * * *

It is hereby stipulated and agreed, by and between Leo A. Rover, Esq., United States Attorney in and for the District of Columbia, counsel for the United States, and Lucian H.

[fol. 7] Vandoren, Esq., counsel for the defendants in the above entitled cause, as follows:

1. That each of the counts of the indictment in the above entitled cause, subsequent to the first count thereof (being counts numbered 2 to 16, both inclusive), is identical in all respects with the said first count thereof, save only with respect to the names, items and amounts appearing on the accounts set forth in said subsequent counts, and save only with respect to the dates of the alleged fraudulent use of the mails, and the places of alleged deposit of accounts in the mails, which dates and places of deposit, as alleged in said subsequent counts, are as follows:

	Date of deposit	Place of deposit
2nd Count	April 30, 1927	Post Office, Scranton, Penna.
3rd Count	May 1, 1927	Post Office, Scranton, Penna.
4th Count	May 19, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
5th Count	May 23, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
6th Count	May 26, 1927	Post Office, Scranton, Penna.
7th Count	May 31, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
8th Count	June 2, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
9th Count	June 6, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
10th Count	June 13, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
11th Count	June 18, 1927	Post Office, Scranton, Penna.
12th Count	June 18, 1927	Post Office, Scranton, Penna.
13th Count	July 7, 1927	Post Office, Scranton, Penna.
14th Count	July 7, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.

[fol. 8]

15th Count . . July 9, 1927 . . Post Office, Philadelphia, Penna.

16th Count . . June 16, 1927 . . Post Office, Scranton, Penna.

2. That the questions raised by the motion in arrest of judgment, filed in this cause, are identical with respect to each and every of the counts of the indictment herein.

3. That the transcript of record to be filed in the Court of Appeals of the District of Columbia, in connection with the appeal prosecuted by the defendants from the judgment of the Supreme Court of the District of Columbia herein, need not embody, in full, each of the sixteen counts of the aforesaid indictment, but it shall be sufficient so far as the said indictment is concerned, to print, in full, the first count thereof and to incorporate, in said transcript of record, this stipulation.

In witness whereof the parties hereto have hereunto subscribed their names at Washington, District of Columbia, this 31st day of March, 1931.

Leo A. Rover, United States Attorney. Lucian H. Vandoren, Counsel for Defendants, Hermann O. Hagner and Julia C. Hagner.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed April 1, 1931

* * * * * * *

The trial court committed error in refusing to sustain the motion in arrest of judgment.

Lucian H. Vandoren, Attorney for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DOCKET ENTRIES

* * * * * * *

Date	Proceedings
1928, July 2.	Presentment and Indictment filed.
1930. Jan. 18.	Each: Arraigned, Plea Not Guilty, M 84 p. 111, 10 days to demur, etc.

[fol. 9]

Date	Proceedings
1930, Mar. 18.	Each: Jury sworn and respited until tomorrow (M. 84, p. 287).
" Mar. 19.	Each: Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 288).
" Mar. 20.	Each: Trial resumed, same jury; Jury respited until Mon. Mar. 24, 1930 (M. 84, p. 291).
" Mar. 24.	Each: Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 299).
" Mar. 25.	Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 300).
" Mar. 26.	Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 301).
" Mar. 31.	Trial resumed, same jury; respited on Mar. 26, 1930; Verdict each guilty as indicted.
" Mar. 31.	Each: Bond for sentence fixed at $2500. Each: Recog. $2500, taken with Milton S. Kronheim, surety (M. 84, p. 321).
1930, Apr. 2.	Each: Motion in Arrest of Judgment & motion for a new trial filed (M. 84, p. 333).
1931, Feb. 3.	Motion in Arrest of Judgment argued and submitted (M. 88, p. 199) (Gordon, J.)
" " 3.	Motion for a new trial argued & submitted (M. 88, p. 199). Gordon, J.
" Mar. 28.	Motion for new trial & motion in arrest of Judgment heretofore argued & submitted, denied, exc.
	Each: Sentenced to Pen. for period of Five (5) years & $1,000.00 fine on each count to run concurrently. To take effect from and including the date of arrival. Each committed. Appeal noted. Cost bond $100.00 or $500.00 cash (M. 88, p. 381).
" " 30.	$50.00 cash deposited in lieu of cost bond on appeal.
" Apr. 1.	Assignment of Errors filed.
" " "	Stipulation of Counsel filed.
" " "	Designation of Record filed.

[fols. 10 & 11] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DIRECTIONS TO CLERK FOR PREPARATION OF TRANSCRIPT OF RECORD—Filed April 1, 1931

* * * * * * *

The appellants hereby designate the following papers and entries to be included in the Transcript of Record on appeal:

1. The first count of the indictment.
2. Pleas.
3. Motion in arrest of judgment.
4. Order over-ruling motion in arrest of judgment, judgment, and memorandum of all proceedings thereafter.
5. Stipulation of counsel filed April 1, 1931.
6. Memorandum of all docket entries.
7. Memorandum of deposit for costs on appeal.
8. This designation.

To Leo A. Rover, Esquire, United States Attorney:

I hereby give notice that I have this day designated the above papers and entries to be included in the Transcript of Record on appeal of the above entitled cause.

Lucian H. Vandoren, Attorney for Defendants.

Service acknowledged and accepted this 31st day of March, 1931.

Leo A. Rover, United States Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

* * * * * * *

No. 5410

HERMAN O. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Oct. 8, 1931

The argument in the above entitled cause was commenced by Mr. L. H. Vandoren, attorney for the appellants, and was concluded by Mr. W. H. Collins, attorney for the appellee. The appellant is allowed to file additional authorities herein.

[fol. 13] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5410

HERMAN O. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES, Appellee

Appeal from the Supreme Court of the District of Columbia

Argued October 8, 1931. Decided November 23, 1931

Lucian H. Vandoren, of Washington, D. C., for appellant.

Leo A. Rover, William H. Collins, and Michael F. Keogh, all of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

GRONER, Associate Justice:

Appellants were indicted and tried in the Supreme Court of the District of Columbia for violating section 215, United States Criminal Code (U. S. C. A., tit. 18, sec. 338). The indictment contained a number of counts. The first is typical of the others. After describing a scheme and artifice to defraud through the sale of certain false accounts-receiv-

able, it alleged "that the said defendants (appellants) so having devised and intended to devise said scheme and artifice to defraud, for the purpose of executing said scheme and artifice to defraud, on, to wit, April 19, 1927, did place and cause to be placed in the post office at the city of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States of America, to the addressee thereof, three certain accounts inclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street NW., Washington, D. C., * * *".

A jury found appellants guilty on each count. Thereupon they moved in arrest of judgment, and from the decision of the lower court overruling their motion this appeal is taken. The basis of the motion is that the indictment on its face shows that the trial court (District of Columbia court) had no jurisdiction because the indictment failed to show the commission of any crime within the jurisdiction of that court. Stated otherwise, the claim was and is that the indictment charged the commission of [fol. 14] an offense in Pennsylvania and not in the District of Columbia. A determination of this question involves an examination of the act of Congress under which the charge is laid. The material part of section 215 of the Criminal Code is as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice * * * place, or cause to be placed, any letter * * * in any post office, * * * to be sent or delivered * * *, or shall take or receive any such therefrom * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any such letter * * * shall be fined * * *, or imprisoned * * *."

The indictment here charges, as we have seen, a scheme to defraud and also that for the purpose of executing it defendants (appellants) placed a letter in the post office in the city of Scranton, to be sent and delivered by the post office establishment to the addressee thereof in Washington, but it wholly failed to charge the delivery of the letter at the point of destination. It will thus be seen that the

indictment is drawn in accordance with the language of the first provision of the statute making it an offense, under the circumstances alleged, to place a letter in a post office to be sent or delivered to the addressee thereof, and the question is whether such a charge, alleging only the act of mailing or depositing the letter in Pennsylvania, is triable in the District of Columbia.

The original statute (215 Criminal Code) did not contain the clause now in the statute making it also an offense for the deviser of the scheme to cause a letter "to be delivered by the mails according to the direction thereon," and the Supreme Court, speaking of the statute as it formerly was, has declared the place of the deposit to be the place of the commission of the offense. Salinger v. Loisel, 265 U. S. 224, 234. And at the same time, speaking of the effect and purpose of the introduction of the new clause into the statute, said:

"That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction of the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective, and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit."

That is to say, as we assume, that under the present statute the Government may elect whether to bring the indictment in the district in which the letter is mailed or the district in which it is received, but obviously in either case the proper averments are essential.

As the indictment in the present case charges the deposit of the letter in Scranton, and does not charge the delivery of the letter in the District of Columbia, it seems to us clear that appellants were not triable under it in the latter place. The placing of the letter in the post office in Scranton under the circumstances related in the indictment was, of course, sufficient to charge an offense committed there and triable there on a similar indictment found there, but the mailing

[fol. 15] alone without also charging delivery in Washington is not, we think, sufficient to charge an offense committed in the District of Columbia and triable there, for it is only by virtue of the amendment of the statute and upon the allegation that the letter mailed in the one place was duly delivered in the other that an offense may properly be charged and tried in the latter; and if this were all, we should have to reverse, but we are confronted with another question which we feel we must notice of our own motion, namely, whether the defective allegation as to venue appearing on the face of the indictment is jurisdictional and therefore may be taken advantage of by motion in arrest of judgment.

In this case the defendants were arraigned and pleaded not guilty, and went to trial and were convicted. Was their failure seasonably to object to the jurisdiction of the trial court a waiver of the right secured them by Article III, section 2, of the Constitution to have a trial in the State and district in which the offense is alleged to have occurred?

In Kansas (Ex parte Mote, 98 Kan. 804, 160 Pac. 223) it was held that the constitutional guaranty insuring a person charged with crime a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed is a personal privilege which the accused may waive, and that it is too late after plea to challenge the jurisdiction of the court. So in South Carolina, State v. Browning, 70 S. C. 466, 50 S. E. 185, it was held that, notwithstanding the constitutional provision guaranteeing to every person charged with crime trial in the county in which the crime is alleged to have occurred, such right is waived when the defendant contests the case upon the merits. And so also in Nebraska, State v. Crinklaw, 49 Nebr. 759, 59 N. W. 370, it was held that the constitutional right to trial by jury in the county in which the crime was committed is a personal privilege of the accused which would be held waived by his application for a change of venue. Cases from other States to the same effect will be found cited in the above-mentioned cases. Some of these cases are: Lightfoot v. Commonwealth, 80 Ky. 516; Hourigan v. Commonwealth, 94 Ky. 520; State v. Fitzgerald, 51 Minn. 534; State v. Gamble, 119 Mo. 427; In re Blum, 30 N. Y. Supp. 396; and People v. Penn., 302 Ill. 488, 135 N. E. 92.

Congress by section 24 of the Judicial Code (28 U. S. C. A. 41 (2)) has conferred upon the district courts (which include the Supreme Court of the District of Columbia) jurisdiction "of all crimes and offenses cognizable under the authority of the United States," and, as the Supreme Court said in Patton v. U. S. 281 U. S. 276, 299, "This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States," but subject of course to any controlling provision of the Constitution. Except therefore that the Constitution provides the venue for trial of offenses against the laws of the United States, there is nothing otherwise to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere within the United States. But by Article III, section 2, the trial of all crimes, except impeachment, "shall be by jury; * * * in the State where the said crimes shall have been committed." This article therefore guarantees to a person charged with crime against the United States the double right to be tried by jury and to [fol. 16] be tried in the State where the crime was committed, and, until the decision of the Supreme Court in Shick v. U. S., 195 U. S. 65, in which it was held the right to a jury trial in a misdemeanor case might be waived, and the Patton case, supra, in which it was held that the right to trial by jury in any criminal case might be waived, it was generally thought that these constitutional safeguards were intended as much in the public interest as in the interest of the person charged with the crime, and therefore were imperative and nonwaivable, but the opinion of the Supreme Court in the Patton case has disposed of this contention—at least as to jury trial—adversely, for there it is specifically held that the theory that the right to waive a jury should be denied on the grounds of public policy is unsound and should be rejected, and, at page 298, the court, referring to Article III, section 2, of the Constitution, said:

"Upon this view of the constitutional provisions we conclude that Article III, section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election."

If, as is thus decided, a person charged with crime may forego a jury trial by agreeing to waive a jury, it would,

we think, be difficult to sustain the view that he may not also in the same manner waive the provision in the same article with relation to the place of trial. Logically it seems to us to follow that both are in the same category. Whatever sanctity growing out of established custom obtains with relation to the trial of a defendant in the vicinage of the crime obtains with equal force with relation to the right to trial by jury, for it was declared as a fundamental principle of the common law in Magna Charta that a person charged with crime should not be convicted except by the unanimous verdict of a jury, and this principle of the common law was brought from their old into their new homes by the colonists who first settled this country, but the rule of the common law is expressly rejected in the Patton case as no longer justified by modern conditions, and in line with this thought, the Supreme Court quotes in the Patton case with approval from Hack v. State, 141 Wis. 346, 351-352, as follows:

"Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the State, and may have his witnesses summoned and paid for by the State; not infrequently he is thus furnished counsel more able than the attorney for the State. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it."

If this reasoning be sound, and if the implication which it carries be reasonably accepted, it would seem to us to

[fol. 17] follow that neither the provision in Article III, section 2, of the Constitution with relation to the place of trial nor the similar provision in the Sixth Amendment—which the Supreme Court held "is not to be regarded as modifying or altering the earlier provision" (Article III, section 2)—is jurisdictional, but were meant and are to be construed to confer rights upon the accused which he may forego at his election. It has apparently never been doubted from the beginning of our judicial history the constitutional right of either party in a suit at common law for trial by jury might be waived. Kearney v. Case, 12 Wall. 275; Kelsey v. Forsyth, 21 How. 85; Duignan v. U. S., 274 U. S. 195, 199. In the latter case it was said:

"Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed."

It is likewise held that the clause in the Judiciary Act, which requires that, where the jurisdiction of the court is founded upon the fact that the parties are citizens of different States, suit shall be brought only in the district where one of them resides, may, in any case of diverse citizenship, be waived by appearing and pleading to the merits. In re Moore, 209 U. S. 490. If, therefore, the premise be granted that the constitutional provision for trial in the State of the offense is not jurisdictional, there would seem to be a reasonable, and indeed conclusive, parallelism between the two classes of cases, civil and criminal.

In the case now under consideration, as we have already seen, the defendants (appellants) appeared, and upon their arraignment pleaded not guilty. They were represented by counsel. They might have pleaded to the jurisdiction. They did not. They elected to go to trial, on an indictment duly charging a violation of a law of the United States, in a court having general jurisdiction of the class of offenses charged. This, we think, was as complete an agreement to waive their constitutional privilege to refuse to be tried in the District of Columbia as though it were in express words. This is the effect of the decisions of the State courts mentioned in this opinion, and it is the universal rule in proceedings in civil cases in the Federal courts, for in the latter it has been

held that even the filing of a demurrer waives all defenses in the service and of special privileges of the defendant in respect to the particular court in which the action is brought. Western Company v. Mining Company, 210 U. S. 368.

In these circumstances we are constrained to hold that while the defendants (appellants) might by a seasonable plea to the jurisdiction have avoided trial in the courts of the District of Columbia under this particular indictment, their submission to that court was a waiver of the privilege accorded them by Article III, section 2, of the Constitution, and in such circumstances they may not after trial and conviction for the first time object to that court's jurisdiction.

Affirmed.

A true copy. Test:

——, Clerk Court of Appeals, D. C.

[fol. 18] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA, OCTOBER TERM, 1931

* * * * * * *

No. 5410

HERMAN Q. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES

JUDGMENT—Nov. 23, 1931

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed.

Per Mr. Justice Groner, November 23, 1931.

[fol. 19] MEMORANDUM

December 2, 1931.—Petition for Rehearing filed.

[fol. 20] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING REHEARING—Dec. 5, 1931

On consideration of the petition for a rehearing in the above entitled cause, it is ordered by the Court that said petition be and it is hereby denied.

[fol. 21] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 16, 1931

The Clerk will please prepare a transcript of the record in the above case, and include:

(1) Printed Record in this Court.
(2) Minute entry of argument.
(3) Opinion & judgment.
(4) Memo. showing petition for rehearing filed.
(5) Memo. showing petition for rehearing overruled.
(6) This designation.
(7) Certificate.

L. H. Vandoren, Atty. for Appellant. Wm. E. Leahy, Wm. J. Hughes, Jr., of Counsel.

December 16/31

[fol. 22] [File endorsement omitted.]

[fol. 23] Clerk's certificate to foregoing Transcript omitted in printing.

[fol. 24] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted, and the case is assigned for argument on Monday, February 29, 1932, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,404. District of Columbia Court of Appeals. Term No. 590. Herman O. Hagner and Julia C. Hagner, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed December 24, 1931. File No. 36,404.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 590

HERMAN H. HAGNER and JULIA C. HAGNER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

Charles H. Vaughan,
Attorney for Petitioners,
Investment Building,
Washington, D. C.

Wm. H. Hagner,
Wm. J. Hagner, Jr.,
Of Counsel,
Investment Building,
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. .....

HERMAN O. HAGNER and JULIA C. HAGNER,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Herman O. Hagner and Julia C. Hagner, respectfully apply for the allowance of a writ of certiorari to review a decision of the Court of Appeals

of the District of Columbia rendered November 23, 1931, a petition for rehearing having been denied by said Court on December 5, 1931 (R. 19-20).

QUESTIONS PRESENTED.

1. Petitioners herein were indicted in the Supreme Court of the District of Columbia for using the mails to defraud in violation of Sec. 215, Penal Code, U. S. The Court below squarely held that while the indictment charged no offense to have been committed in the District of Columbia, and defendants "were not triable under it in the latter place" (R. 14-15), yet, having pleaded not guilty (though regularly moving in arrest of judgment), they must be deemed to have "waived" their "right" to be tried in Pennsylvania (wherein the indictment charged the commission of the offense, as held by the Court below). This case therefore presents for the first time the question whether a defendant can by implication "waive" the requirements of Article III, Sec. 2 of the Constitution that the trial of crimes "shall be by jury; * * * * in the State where the said crimes shall have been committed," and the provisions of the Sixth Amendment that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

2. A second question is presented: even if, under the doctrine of *Patton* v. *U. S.*, 281 U. S. 276 (wherein a jury of twelve was waived), the defendants could "waive" their "right" to be tried in Pennsylvania, has the Supreme Court of the District of Columbia ju-

risdiction to try defendants for crimes committed in Pennsylvania (or in Maine, New Mexico, or California), on the ground that under Sec. 24, Judicial Code, the Supreme Court of the District of Columbia has the *territorial jurisdiction* of all the District Courts in the United States, there being, as the Court below held, no Federal venue statute, but only the Constitutional requirements which defendants could "waive."

In this connection, it may even be questioned whether Congress *could,* Constitutionally, confer on the Supreme Court of the District of Columbia power to try offenders for crimes committed in the various States, the grant of judicial power to the Supreme Court of the District of Columbia being derived from the Constitution Art. I, Sec. 8, Clause 17, giving Congress exclusive legislative power over the District containing the Seat of Government. The power to try accused persons for offenses committed in the various states certainly seems to bear no reasonable relationship to the government of the District of Columbia.

3. Thirdly, this case presents the question whether, by a so-called "waiver," a defendant can confer extra-territorial jurisdiction upon the Supreme Court of the District of Columbia when its criminal jurisdiction is expressly limited by Sec. 44, Title 18, D. C. Code to "crimes and offenses *committed within said District.*" Sec. 43 seems clearly limited by Sec. 44, though the Court below has impliedly so construed these sections as to arrive at the opposite conclusion.

STATEMENT OF FACTS.

Defendants herein were indicted and tried in the Supreme Court of the District of Columbia for violat-

ing Section 215, United States Criminal Code (U. S. C. A., Tit. 18, Sec. 338). The indictment, after describing an alleged scheme and artifice to defraud, averred that the defendants, for the purpose of executing said scheme and artifice, did place and cause to be placed in the post office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States, certain described mail matter. The indictment did not charge that the defendants had knowingly caused such matter to be delivered in the District of Columbia (R. 1-3).

A jury found defendants guilty and thereupon they moved in arrest of judgment, which motion was denied (R. 4). An appeal was taken to the Court of Appeals of the District of Columbia. That Court, while holding the indictment charged no offense to have been committed in the District of Columbia (R. 14-15), affirmed the judgment of conviction on the authority of *Patton* v. *U. S.*, 281 U. S. 276, and held that the defendants had as completely agreed to waive "their Constitutional privilege to refuse to be tried in the District of Columbia" as though their "waiver" were in express words; and that defendants might not, by Motion in Arrest of Judgment, point out the lack of the court's jurisdiction (R. 17-18).

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The decision below obviously determines important questions of constitutional law. It by no means follows from this Court's decision in *Patton* v. *U. S.*, *supra*, permitting an express and intelligent waiver of

the regulation jury of twelve, that *all* constitutional provisions may be waived, including the requirements of Article III, Sec. 2 and Amendment Six. Conceding, *arguendo*, that as said by the Court below "there is nothing to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere in the United States" it is in the highest degree unlikely that Congress has already done so. In fact, the history of Congressional legislation in this country for over a hundred years shows a scrupulous care on the part of Congress clearly to delimit and define the territorial jurisdiction of each Judicial District. It is altogether surprising to counsel to hear it said by any Court that because Sec. 24 of the Judicial Code confers on the district courts jurisdiction of "all crimes and offenses cognizable under the authority of the United States," the Supreme Court of the District of Columbia has jurisdiction of crimes and offenses committed in any state in the Union. It seems obvious that "jurisdiction" in Sec. 24, Judicial Code, and Sec. 43, Title 18, D. C. Code, refers to jurisdiction of the *subject-matter*, not to *territorial jurisdiction*. The *territorial jurisdiction* of the District Courts is set forth in the statutes geographically defining the various Judicial Districts (Judicial Code, Sec. 69-116). The territorial jurisdiction of the Supreme Court of the District of Columbia is set forth, equally clearly, in Sec. 44, Title 18, D. C. Code. There is certainly no way for a defendant to "waive" jurisdiction of a Federal Court in the sense of adding territory beyond the confines provided by Statute; nor can a defendant, by any form of waiver, confer jurisdiction where without it none exists.

2. There is a conflict of decision between that of the

Court below and the decision of this Court in *Salinger* v. *Loisel*, 265 U. S. 224, condemning the attempted trial of offenders in a district other than the district wherein the crime was committed, and the decision of this Court in *Ex parte Bradley*, 7 Wall. 364, to the effect that the criminal jurisdiction of the Supreme Court of the District of Columbia is limited to the trial of crimes and offenses committed in that District.

WHEREFORE your petitioners pray the allowance of a writ of certiorari to the Court of Appeals of the District of Columbia in this cause, there entitled Herman O. Hagner and Julia C. Hagner, Appellants, v. United States, Appellee, No. 5410, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

HERMAN O. HAGNER,
JULIA C. HAGNER,
Petitioners.

LUCIAN H. VANDOREN,
Attorney for Petitioners.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

The judgment of the Court of Appeals was entered November 23, 1931 (R. 19), a petition for rehearing being denied December 5, 1931 (R. 20).

Jurisdiction of this Court to review the judgment below is invoked under Section 240-a of the Judicial Code.

The opinion of the Court below is not yet reported.

ARGUMENT

The Court below squarely held, citing authorities, that the indictment herein charged no offense to have been committed in the District of Columbia (R. 14-15). At the same time it held defendants triable therein. (R. 19.)

In order to sustain the validity of this decision it is necessary to hold:

(1) That defendants be deemed capable of "waiving" the requirements of Article III, Section 2 and Amendment 6 of the Constitution of the United States relative to trial by a jury of the state and district wherein the offense was committed;

(2) That defendants in the present case have in fact "waived" their "right" to be tried in Pennsylvania;

(3) That the Supreme Court of the District of Columbia has *territorial jurisdiction* over offenses committed in Pennsylvania.

It is obvious that, even conceding (1) and (2), above, it is essential to the validity of the judgment below

that Congress shall have conferred jurisdiction on the Supreme Court of the District of Columbia over offenses committed in Pennsylvania instead of having, as counsel contend, strictly limited the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses *committed within said District*" (Sec. 44, Title 18, D. C. Code). It may be gravely questioned whether Congress has, under the Constitution, any such power to confer upon the Supreme Court of the District of Columbia jurisdiction over offenses committed in Pennsylvania, the power of Congress to legislate for the District of Columbia being conferred by the Constitution, Article I, Section 8, Clause 17, giving it power to enact all necessary legislation for the government of said district. There would seem to be grave doubt whether the power to try accused persons in the District of Columbia for offenses committed in Pennsylvania bears any reasonable relationship to the government of the District of Columbia.

I.

The Constitutional Requirements of Article III, Section 2, and Amendment 6, Relative to Trial by a Jury of the State and District Wherein the Offense Was Committed, Cannot Be "Waived."

The Court below seems to have taken for granted that because this Court held, in *Patton* v. *U. S.*, 281 U. S. 276, that a defendant by an express and intelligent waiver could constitutionally waive his right to be tried by a full jury of twelve, that a defendant likewise can be inferred to "waive" his "right" to be

tried by an impartial jury in the state and in the district wherein the crime has been committed, which district shall have been previously ascertained by law. The constitutional provisions are as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed", (Article III, Section 2).
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment 6).

There is no question in the present case of the application of the above sections to the District of Columbia for the reason that the indictment alleges the offense was committed in Pennsylvania, and the Court below so held. There is, therefore, squarely presented the question whether these constitutional provisions are not mandatory upon the Government. The Court below held, on the authority of *Patton* v. *U. S., supra,* that they could be waived. If so, there is a clear conflict of decision between *Patton* v. *U. S., supra,* and *Salinger* v. *Loisel,* 265 U. S. 224, 69 L. Ed. 989, wherein this Court said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district."

There are several indications that the provisions of

Article III, Section 2, above, cannot be waived. The words "and such trial shall be held in the state where the said crimes shall have been committed" are clearly directed to the Government and not to the defendant. They constitute a limitation upon the powers of the Government with reference to place of trial, instead of conferring, as held below, an option upon the defendant. If they be interpreted to mean that a "right" is accorded the defendant, an enigma is presented as to how the defendant may avail himself of that "right." It should be noted that the provision states "where the said crimes shall have been committed," not where the said crimes shall be *alleged* to have been committed. If, therefore, this provision be interpreted as conferring a waivable right upon a defendant it leads to the conclusion that he must confess his crime before he can assert the right. Certainly no such construction seems reasonable in view of other provisions of the Constitution prohibiting compulsory self-incrimination. It is illogical to suppose that a defendant must give up one right under the Constitution in order to assert another.

The provisions of the 6th Amendment are likewise mandatory as to the place where the trial shall be had. They are likewise directed to the Government in the form of a limitation upon Governmental power. The words, "the accused shall enjoy the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed," prescribe not merely the place of trial, but the source of the jury by which the accused shall be tried. The words, "which district shall have been previously ascertained by law," are a further indication that this requirement operates retrospectively upon the Government, instead

of conferring a mere privilege upon the defendant. In fact this provision of the Constitution must be violated by the Government before a defendant would ever be in a position wherein he would be required to assert his right.

The statement by the Court below that there is no Federal venue statute is no aid to that Court in its opinion. The obvious reason why no Federal criminal venue statute exists is the clear and explicit provisions of the Constitution. Congress never thought it necessary that any statute should be passed further safeguarding provisions of the Constitution which seem so clear that they are self-sufficient. Certainly until the present case no one imagined that any Federal Court could exercise a criminal jurisdiction beyond the confines of the judicial district wherein it was located, in the case of the District courts, or beyond the District of Columbia in the case of the Supreme Court of the District of Columbia.

II.

Defendants Have Not, in the Present Case, "Waived" Their "Right" To Be Tried in Pennsylvania.

As indicated in discussing the last point, either the constitutional provisions relative to trial in the state and district wherein the offense was committed are binding upon the Government, or they are a nullity. There is no way in which a defendant can assert any so-called "right" to be tried in the state "wherein the crime was committed." If the constitutional provisions be considered to confer a waivable right, necessarily the defendant must assert such right within the

terms of the constitutional grant. This means in the instant case that he must make clear to the court, in some way not disclosed by the court below, that the offense was committed in Pennsylvania.

The Patton case, counsel submit, is no authority for the decision below. In the Patton case there was an express and intelligent waiver; in the present case there is an alleged waiver by implication and, counsel submit, a strained implication. There is nothing in the Patton case tending to indicate that this Court intended to overrule its previous decision in *Thompson* v. *Utah*, 170 U. S. 353, 42 L. Ed. 1067, to the effect that a defendant could not by mere silence waive the requirement of a constitutional jury of twelve. With reference to *Thompson* v. *Utah*, *supra*, this court said, in *Patton* v. *U. S.*, *supra*:

> "The case involved the validity of a statute dispensing with the common-law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, *but only that he had not objected until after verdict.* The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute" (*Patton* v. *U. S.*, 281 U. S. 276, 293).

It may be noted that in the present case the defendants, as in *Thompson* v. *Utah*, did not consent to the trial, but only did not object until after the verdict (R. 4).

The last paragraph of this Court's opinion in the *Patton* case, containing as it does a caution against Federal courts accepting, without careful considera-

tion, indiscriminate waivers of constitutional rights, is likewise pertinent to the present case wherein the defendants literally did not know they possessed the "right" the Court of Appeals has now held they waived. In addition, it should be remembered that the trial of the present case was concluded prior to the decision of this Court in *Patton* v. *U. S.*, *supra*, and at a time when defendants had a right to rely upon their constitutional rights as they then were interpreted; when, in fact, as the law stood at the date of the trial herein, it was impossible for a defendant to "waive" the constitutional rights herein involved.

III.

Even if Defendants Can Waive and Have Waived Their Right To Be Tried in Pennsylvania, the Supreme Court of the District of Columbia Has No Jurisdiction To Try Them for an Offense Committed in That State.

The Court below in its decision overlooks the distinction between *venue* and the *territorial jurisdiction* of the Supreme Court of the District of Columbia. It is petitioners' claim that the jurisdiction of that court is territorially limited, by a specific statute, not noticed by the court below in its opinion, to crimes and offenses *committed in the District of Columbia.*

If so territorially limited, there is no way for petitioners to "waive" their "right" to be tried in Pennsylvania for the reason that the Supreme Court of the District of Columbia would have no jurisdiction, waiver or no waiver, due to the absolute lack of a statutory

grant of judicial power. No authorities are needed to show that a defendant in a criminal case cannot "waive" jurisdiction in the sense of adding territory to the jurisdiction of a Federal court beyond the confines provided by statute.

Pertinent statutes are as follows:

The Code of the District of Columbia (completed to March 4, 1929), title 18, sec. 43 provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)
>
> "44. *Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties, * * * *."

Sec. 44 specifically limits the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses committed within said District." The words "except as otherwise provided in this title" in Sec. 44 above, are not found in any of the Acts of Congress making up Sec. 44, and are apparently the interpolation of the codifier. In any case they refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia conferred in Chapter 4 and Chapter 6 of the same title (Title 18, Code of the District of Columbia).

The decision of the Court below amounts to holding

that Sec. 43 contains a broader grant of territorial jurisdiction than Sec. 44. It seems to counsel that such a construction is open to considerable argument.

Sec. 44 would seem to be a specific enactment limiting the general terms of Sec. 43, even if "jurisdiction" in Sec. 43 be held to mean "territorial jurisdiction." The well known provision of the Constitution, which Congress must be presumed to have had in mind when it enacted Sec. 43, above, that the trial of crimes should be in the State wherein the crime was committed, is a strong indication that Congress did not intend "jurisdiction" in Sec. 43 to refer in any way to territorial jurisdiction but used it to indicate the *class* of cases over which the court should have power. Congress must be presumed to have legislated with regard to the general rule prescribed by the Constitution that the trial of crimes shall be in the State and district wherein the crime was committed rather than with reference to the possible exception of a waiver (not then judicially sanctioned) of that rule by a defendant. The total absence of a general Federal venue statute relative to crimes is likewise a strong indication that Congress considered the constitutional provisions so clear as to render unnecessary specific legislation territorially limiting the criminal jurisdiction of the District Courts. The statement by the Court below in its opinion

> "Except, therefore, that the Constitution provides the venue for trial of offenses against the laws of the United States, *there is nothing otherwise to prevent the enactment by Congress of a law* permitting and providing for the trial of criminal cases anywhere within the United States."

raises the serious question, independently of what counsel believe to be the controlling provisions of Sec. 44 above, and even if a waiver be conceded, as to whether Congress has, in point of fact, conferred extra-territorial jurisdiction on the Supreme Court of the District of Columbia. The only possible basis, as seen above, for that contention, is the construction of the Court below that "jurisdiction" in Sec. 43 means "territorial jurisdiction" instead of obviously meaning jurisdiction of the *subject-matter*.

It will come as a considerable surprise to practioners before the Supreme Court of the District of Columbia and possibly to the Court itself to hear that that Court has jurisdiction to try defendants upon indictments alleging offenses committed in States such as Montana, Wisconsin, Maine or New Mexico, provided the defendant "waives" his "right" to be tried in the place where the indictment alleges the offense was committed.

For the convenience of the Court there is attached hereto, as Appendix I, the legislative history of Sec. 43 and Sec. 44 of the District of Columbia Code, from which it will be seen that Sec. 44 is a specific enactment limiting the general provisions of Sec. 43.

It may be noted that this Court has already held in *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214, that the jurisdiction of the Supreme Court of the District of Columbia in criminal matters is limited to jurisdiction "*to hear and punish crimes and offenses committed within the District.*"

CONCLUSION.

It is respectfully submitted that the petition herein should be granted and the judgment below reversed.

Respectfully submitted,

LUCIAN H. VANDOREN,
Attorney for Petitioners.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Of Counsel.

APPENDIX I.

The Code of the District of Columbia (complete to March 4, 1929), title 18, sec. 43 provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a court of the United States." (Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; Mar. 3, 1911, 36 Stat. 1167, c. 231, sec. 289.)
>
> "44.—*Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District and of all cases in law and equity between parties, * * *."

Section 43 above was derived from the Act of March 3, 1863, 12 Stat. 762, c. 91, which established the Supreme Court of the District of Columbia, and provided that any one of the Justices thereof might hold special terms of the said court. Section 3 then provides:

> "Sec. 3. * * * * Any one of said Justices may also hold a criminal court for the trial of all crimes and offenses *arising within said District*, which court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia."

The "Criminal Court of the District of Columbia" referred to in the last sentence above was originally constituted by the Act of February 27, 1801 (Davis' Laws, District of Columbia, 1831, p. 124), Sec. 5 of which reads as follows:

> "Sec. 5. *Be it further enacted*, That said court

shall have cognizance of all crimes and offenses *committed within said District*, and of all cases in law and equity, etc."

The "criminal" court was constituted and named as such by Sec. 1, Chap. 128 of the Revised Code of the District of Columbia, 1857, Revision of Ould and Cross, Sec. 4, provided as follows:

> "Sec. 4. The Criminal Court shall, except when otherwise expressly provided by law, have exclusive jurisdiction in the trial and punishment of all crimes and offenses *committed within the District.*"

Returning to the amendments to Sec. 43 above, the Act of March 3, 1901, 31 Stat. 1199, c. 854, Sec. 61, provides:

> "Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia at the date of the passage of this Code."

This provision was further amended by the Act of June 30, 1902, 32 Stat. 522, c. 1329, by adding after the words "District of Columbia" in Sec. 61 above, the words:

> "Under the Act of Congress, approved March 3, 1863, creating that court, and."

The last amendment to this section made by the Act of March 3, 1911, 36 Stat. 1167, Chap. 231, Sec. 289, is simply the familiar statute abolishing the Circuit

Courts and providing for the transfer of their records to the District courts.

Sec. 44 was originally Sec. 763 of the Revised Statutes relating to the District of Columbia and read as follows:

> "Sec. 763. Any one of the Justices may hold a criminal court for the trial of all crimes and offenses *arising within the District.*"

This section was amended by the Act of February 27, 1877, 19 Stat. 253, c. 69, Sec. 2, as follows:

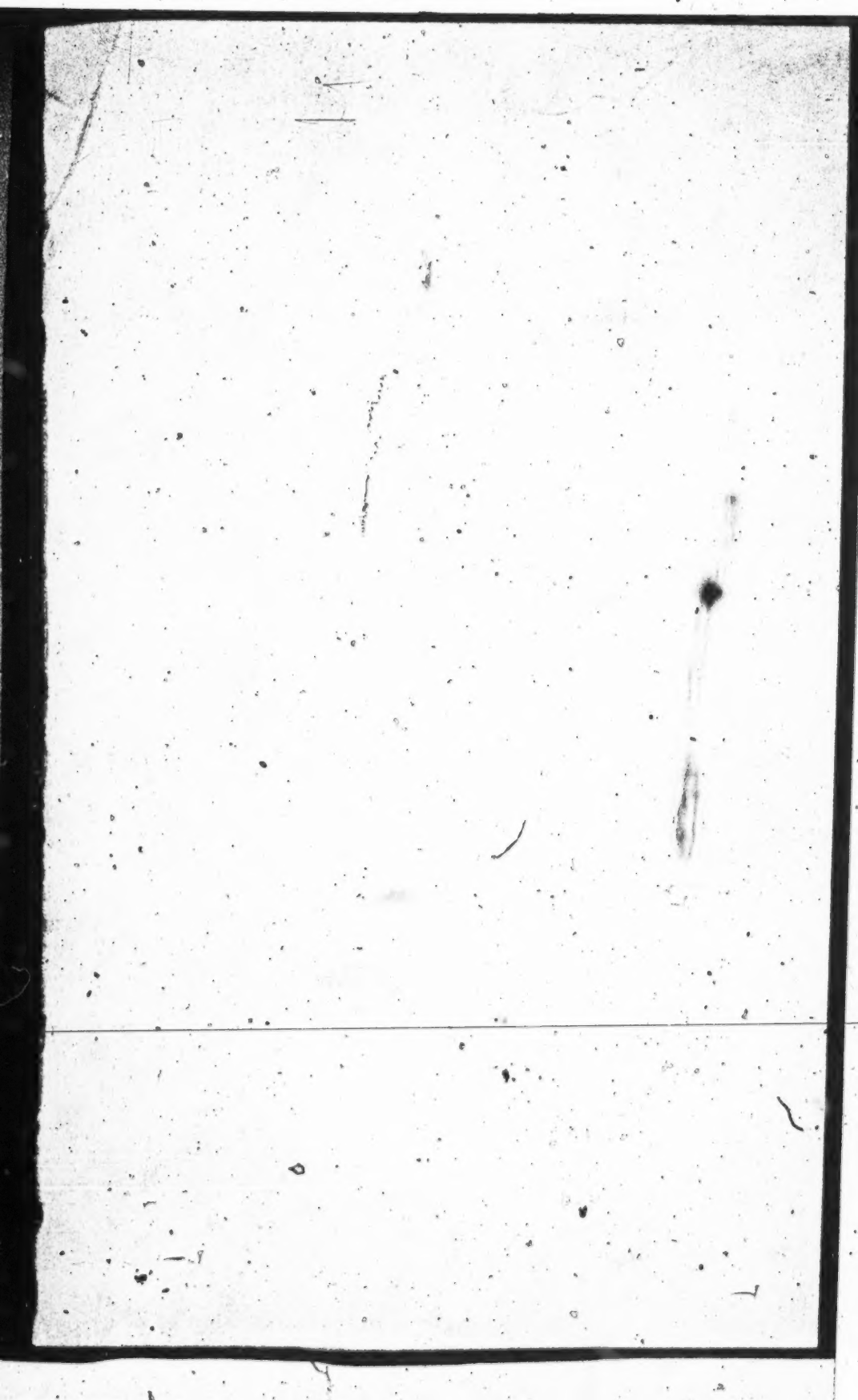
> "Section seven hundred and sixty-three is amended by striking out said section and inserting in lieu thereof the following as section seven hundred and sixty-three;"
>
> "Said courts shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties * * *."

A further amendment was made by Act of March 3, 1901, 31 Stat., p. 1202, Sec. 83, reading as follows:

> "Sec. 83. *The Criminal Court.*—The trial of crimes and misdemeanors *committed in the District of Columbia* shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court, * * *."

As above noted, the words "except as otherwise provided in this title" in Sec. 44 above, refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia, conferred in Chap. 4 and Chap. 6 of this title. The words "except as otherwise provided in this title" are not found in any of the Acts of Congress from which Sec. 44 is derived and are apparently the addition of the codifier.

(Italics throughout are those of counsel herein.)



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 590.

HERMAN O. HAGNER and JULIA C. HAGNER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONERS.

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In The

Supreme Court of the United States

October Term, 1931.

No. 590.

Herman O. Hagner and Julia C. Hagner,
Petitioners,

v.

The United States of America,
Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals of the District of Columbia has not yet been reported. It will be found at page 10 of the record.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered November 23, 1931 (R. 17), a petition for rehearing being denied December 5, 1931 (R. 18). Petition for a Writ of Certiorari was filed December 24, 1931, and was granted January 25, 1932 (R. 19). The jurisdiction of this Court rests upon Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Supreme Court of the District of Columbia has jurisdiction of a crime alleged to have been committed in Pennsylvania.

2. Assuming that the Supreme Court of the District of Columbia has jurisdiction of a crime alleged to have been committed in Pennsylvania, are the provisions of Article III, Section 2, Clause 3, and Amendment 6 of the Constitution of the United States, relative to trial by jury of the State and District wherein the offense was committed, capable of being waived?

3. Assuming they were capable of being waived, were they waived when petitioners demanded trial by jury, pleaded not guilty and later filed a Motion in Arrest of Judgment?

Statutes Involved.

Section 215, Criminal Code:

"Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice * * * place, or cause to be placed, any letter * * * in any post office, * * * to be

sent or delivered * * *, or shall take or receive any such therefrom * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any such letter * * * shall be fined * * *, or imprisoned * * *."

The Code of the District of Columbia (completed to March 4, 1929, title 18, sec. 43):

"43. *Jurisdiction; Powers of Circuit and District Courts Conferred.* The said Court shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)

"44. *Same; General Jurisdiction.* Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District, and of all cases in law and equity between parties, * * *."

Constitution.

Article III, Section 2, Clause 3 of the Constitution of the United States:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed."

Amendment 6 of the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Statement of Facts.

Defendants herein were indicted and tried in the Supreme Court of the District of Columbia for violating Section 215, United States Criminal Code (U. S. C. A. Tit. 18, Sec. 338). The indictment, after describing an alleged scheme and artifice to defraud, averred that the defendants, for the purpose of executing said scheme and artifice, did place and cause to be placed in the post office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States, certain described mail matter. The indictment did not charge that the defendants had knowingly caused such matter to be delivered in the District of Columbia (R. 1-3).

A jury found defendants guilty and thereupon they moved in arrest of judgment, which motion was denied (R. 4, 5). An appeal was taken to the Court of Appeals of the District of Columbia. That Court, while holding the indictment charged no offense to have been committed in the District of Columbia but that instead it alleged the offense was committed in Pennsylvania (R. 11-12), affirmed the judgment of conviction on the authority of *Patton* v. *U. S.*, 281 U. S. 276, and held that the defendants had as completely agreed to waive "their Constitutional privilege to refuse to be tried in the District of Columbia" as though their "waiver" were in express words; and that defendants might not, by Motion in Arrest of Judgment, point out the lack of the court's jurisdiction (R. 16-17).

Specification of Error.

The Court of Appeals of the District of Columbia erred in holding that the Supreme Court of the District of Columbia had jurisdiction to try petitioners upon the indictment herein and in denying petitioners' Motion in Arrest of Judgment (R. 5).

Summary of Argument.

1. The indictment, under the decision below and the authorities, charges no offense to have been committed in the District of Columbia but charges the offense was committed in Pennsylvania.

2. The criminal jurisdiction of the Supreme Court of the District of Columbia is limited by Section 44 of the Code of the District of Columbia to crimes and offenses committed within said District.

3. There is no such thing as extraterritorial jurisdiction of the District Courts of the United States or of the Supreme Court of the District of Columbia.

4. Even assuming the Supreme Court of the District of Columbia has an extraterritorial jurisdiction, the provisions of the Constitution, Article III, Section 2, and Amendment 6, require the trial to be in the State and District wherein the crime was committed, i. e. Pennsylvania, and such Constitutional provisions cannot be "waived."

5. Even if they could be waived, petitioners herein did not waive them, but on the contrary invoked them when they demanded a jury trial, pleaded not guilty and later moved in arrest of judgment.

6. The decision below violates the caution contained in *Patton* v. *United States, supra,* against waiver by *implication* of Constitutional rights.

ARGUMENT.

I.

The Indictment Herein Charges No Offense to Have Been Committed in the District of Columbia, but Alleges That the Offense Was Committed in Pennsylvania.

The indictment herein alleges a violation of Section 215, U. S. Criminal Code. The Court below in its opinion describes it as follows:

> "The indictment here charges, as we have seen, a scheme to defraud and also that for the purpose of executing it defendants (appellants) placed a letter in the post office in the city of Scranton, to be sent and delivered by the post office establishment to the addressee thereof in Washington, but it wholly failed to charge the delivery of the letter at the point of destination. It will thus be seen that the indictment is drawn in accordance with the language of the first provision of the statute making it an offense, under the circumstances alleged, to place a letter in a post office to be sent or delivered to the addressee thereof, and the question is whether such a charge, alleging only the act of mailing or depositing the letter in Pennsylvania, is triable in the District of Columbia.
>
> "The original statute (215 Criminal Code) did not contain the clause now in the statute making it also an offense for the deviser of the scheme to cause a letter 'to be delivered by the mails according to the direction thereon' and the Supreme Court, speaking of the statute as it formerly was, has declared the place of the deposit to be the place of the commission of the offense. *Salinger* v. *Loisel*, 265 U. S. 224, 234. And at the same time, speaking of the effect and purpose of the introduction of the new clause into the statute, said:

"'That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction of the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective, and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit.'

"That is to say, we assume, that under the present statute the Government may elect whether to bring the indictment in the district in which the letter is mailed or the district in which it is received, but obviously in either case the proper averments are essential.

"As the indictment in the present case charges the deposit of the letter in Scranton, and does not charge the delivery of the letter in the District of Columbia, it seems to us clear that appellants were not triable under it in the latter place. The placing of the letter in the post office in Scranton under the circumstances related in the indictment was, of course, sufficient to charge an offense committed there and triable there on a similar indictment found there, but the mailing alone without also charging delivery in Washington is not, we think, sufficient to charge an offense committed in the District of Columbia and triable there, for it is only by virtue of the amendment of the statute and upon the allegation that the letter mailed in the one place was duly delivered in the other that an offense may properly be charged and tried in the latter; and if this were all, we should have to reverse" (R. 11-13).

The Court below then goes on to say that petitioners have, however, waived, by failing seasonably to object, their right to be tried in Pennsylvania.

The decision of the Court below, as to failure to allege an offense in the District of Columbia, follows the decision of this Court in *Salinger* v. *Loisel*, 265 U. S. 264, 68 L. Ed. 989, and the following cases:

United States v. *Sauer*, 88 F. 249;
Stewart v. *United States*, 119 F. 89;
United States v. *Conrad*, 59 F. 458.

From the above cases it will be seen that where it is desired to charge a violation of Section 215 in the place where the letter is delivered it is an absolute prerequisite to such charge that the indictment should allege the delivery of the letter in that place.

II.

Section 44, Title 18, of the Code of the District of Columbia Limits the Criminal Jurisdiction of the Supreme Court of the District of Columbia to Crimes and Offenses Committed Within Said District.

The Court below in its decision overlooks the distinction between *venue* and the *territorial jurisdiction* of the Supreme Court of the District of Columbia. It is petitioners' claim that the jurisdiction of that court is territorially limited, by a specific statute, not noticed by the court below in its opinion, to crimes and offenses *committed in the District of Columbia*.

If so territorially limited, there is no way for petitioners to "waive" their "right" to be tried in Penn-

sylvania for the reason that the Supreme Court of the District of Columbia would have no jurisdiction, waiver or no waiver, due to the absolute lack of a statutory grant of judicial power. No authorities are needed to show that a defendant in a criminal case cannot "waive" jurisdiction in the sense of adding territory to the jurisdiction of a Federal court beyond the confines provided by statute.

Pertinent statutes are as follows:

The Code of the District of Columbia (completed to March 4, 1929), title 18, sec. 43:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1189, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)
>
> "44. *Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties, * * * *."

Sec. 44 specifically limits the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses committed within said District." The words "except as otherwise provided in this title" in Sec. 44 above, are not found in any of the Acts of Congress making up Sec. 44, and are apparently the interpolation of the codifier. In any case they refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia conferred in Chapter 4 and Chapter 6 of the same title (Title 18, Code of the District of Columbia).

The decision of the Court below amounts to holding that Sec. 43 contains a broader grant of territorial jurisdiction than Sec. 44. It seems to counsel that such a construction is open to considerable argument.

Sec. 44 would seem to be a specific enactment limiting the general terms of Sec. 43, even if "jurisdiction" in Sec. 43 be held to mean "territorial jurisdiction." The well known provision of the Constitution, which Congress must be presumed to have had in mind when it enacted Sec. 43, above, that the trial of crimes should be in the State wherein the crime was committed, is a strong indication that Congress did not intend "jurisdiction" in Sec. 43 to refer in any way to territorial jurisdiction but used it to indicate the *class* of cases over which the court should have power. Congress must be presumed to have legislated with regard to the general rule prescribed by the Constitution that the trial of crimes shall be in the State and district wherein the crime was committed rather than with reference to the possible exception of a waiver (not then judicially sanctioned) of that rule by a defendant. The total absence of a general Federal venue statute relative to crimes is likewise a strong indication that Congress considered the constitutional provisions so clear as to render unnecessary specific legislation territorially limiting the criminal jurisdiction of the District Courts. The statement by the Court below in its opinion

> "Except, therefore, that the Constitution provides the venue for trial of offenses against the laws of the United States, *there is nothing otherwise to prevent the enactment by Congress of a law* permitting and providing for the trial of criminal cases anywhere within the United States."

raises the serious question, independently of what counsel believe to be the controlling provisions of Sec. 44 above, and even if a waiver be conceded, as to whether Congress has, in point of fact, conferred extraterritorial jurisdiction on the Supreme Court of the District of Columbia. The only possible basis, as seen above, for that contention, is the construction of the Court below that "jurisdiction" in Sec. 43 means "territorial jurisdiction" instead of obviously meaning jurisdiction of the *subject-matter*.

Conceding, *arguendo*, that as said by the Court below "there is nothing to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere in the United States" it is in the highest degree unlikely that Congress has already done so. In fact, the history of Congressional legislation in this country for over a hundred years shows a scrupulous care on the part of Congress clearly to delimit and define the territorial jurisdiction of each Judicial District. It is altogether surprising to counsel to hear it said by any Court that because Sec. 24 of the Judicial Code confers on the district courts jurisdiction of "all crimes and offenses cognizable under the authority of the United States," the Supreme Court of the District of Columbia has jurisdiction of crimes and offenses committed in any state in the Union. It seems obvious that "jurisdiction" in Sec. 24, Judicial Code, and Sec. 43, Title 18, D. C. Code, refers to jurisdiction of the *subject-matter*, not to *territorial jurisdiction*. The *territorial jurisdiction* of the District Courts is set forth in the statutes geographically defining the various Judicial Districts (Judicial Code, Sec. 69-116). The territorial jurisdiction of the Supreme Court of the District of Columbia is set forth, equally clearly, in Sec. 44, Title 18, D. C. Code.

For the convenience of the Court there is attached

hereto, as Appendix I, the legislative history of Sec. 43 and 44 of the District of Columbia Code, from which it will be seen that Sec. 44 is a specific enactment limiting the general provisions of Sec. 43.

It may be noted that this Court has already held in *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214, that the jurisdiction of the Supreme Court of the District of Columbia in criminal matters is limited to jurisdiction *"to hear and punish crimes and offenses committed within the District."*

III.

There Is No Such Thing as Extraterritorial Jurisdiction of the District Courts of the United States, or of the Supreme Court of the District of Columbia.

The decision of the Court below reduces itself to this: (1) The Supreme Court of the District of Columbia under Section 24 of the Judicial Code has the "jurisdiction" of the District Courts; (2) there is a District Court in Pennsylvania, wherein the indictment charges the offense was committed; (3) the defendants could be tried in the District Court of Pennsylvania if they insist on the Constitutional venue provisions; (4) they have waived such provisions, and the Supreme Court of the District of Columbia having the jurisdiction of the District Courts of Pennsylvania, they can be tried here.

The meaning of "jurisdiction" in Section 24 of the Judicial Code, as referring to jurisdiction of the *subject matter*, has already been discussed. But aside from this, which seems sufficiently obvious, nothing is better settled than that the United States District Courts exercise a strictly territorial jurisdiction. The

decision below amounts to holding that each district court has the *territorial jurisdiction* of all the other district courts. Only in such a way can the Supreme Court of the District of Columbia be invested with the territorial jurisdiction of the United States District Courts of Pennsylvania.

As opposed to this view it may be said that for over a century it has been consistently held that United States Courts exercise a strictly territorial jurisdiction. Thus, this Court in *Toland* v. *Sprague*, 12 Peters 300, 328, decided in 1838, said with reference to the old circuit courts:

> "The judiciary act has divided the United States into judicial districts. Within these districts a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district."

These principles have been applied in the following cases:

U. S. v. *Alberty*, Fed. Cas. No. 14426;
Ex Parte Graham, Fed. Cas. No. 5657;
Wilson v. *Graham*, Fed. Cas. No. 17804;
Gopsevic v. *California Packing Co.*, 272 F. 994;
In re Geller, 216 F. 561;
Staunton v. *Wooden*, 179 F. 64;
U. S. v. *Stern*, 177 F. 480;
Walker v. *Lea*, 47 F. 649.

As to the decision in *Patton* v. *United States*, *supra*, this court certainly never intended that case to be made the basis of such a drastic alteration in the rules of criminal pleading as to dispense with the necessity for the allegation of venue in an indictment. In fact, it is

only through the allegation of venue that a court initially acquires jurisdiction. If, therefore, venue must be alleged, it must be alleged somewhere.

Under the decision below, and the law, if the indictment herein does not lay it in the District of Columbia it lays it in Pensylvania. If it is laid in Pennsylvania and the Supreme Court of the District of Columbia takes cognizance of the crime and tries the offenders, or puts them into a position to plead, or waive, or do anything else, it is submitted that the Court exercises an extraterritorial jurisdiction and this, under the law, it cannot do.

IV.

Assuming, for the Sake of Argument, That the Supreme Court of the District of Columbia Has Territorial Jurisdiction Reaching into Pennsylvania, or Assuming, Which Seems Equally Fantastic, That There Is No Such Thing as Territorial Jurisdiction, Which Is What the Opinion of the Court Below Ultimately Resolves Itself Into, It Seems Extremely Doubtful to Counsel That the Provisions of Article III, Section 2, and Amendment 6 of the Constitution Relative to Trial by Jury of the State and District Wherein the Offense Was Committed, can Be "Waived."

The Court below seems to have taken for granted that because this Court held, in *Patton* v. *U. S.*, 281 U. S. 276, that a defendant by an express and intelligent waiver could constitutionally waive his right to be tried by a full jury of twelve, that a defendant likewise can be inferred to "waive" his "right" to be tried by an impartial jury in the state and in the district wherein the crime has been committed, which

district shall have been previously ascertained by law. The constitutional provisions are as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed" (Article III, Section 2).
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment 6).

There is no question in the present case of the application of the above sections to the District of Columbia for the reason that the indictment alleges the offense was committed in Pensylvania, and the Court below so held. In addition, the Sixth Amendment has been held applicable to the District of Columbia (*Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Callan* v. *Wilson*, 127 U. S. 540). There is, therefore, squarely presented the question whether these constitutional provisions are not mandatory upon the Government. The Court below held, on the authority of *Patton* v. *U. S.*, *supra*, that they could be waived. If so, there is a clear conflict of decision between *Patton* v. *U. S.*, *supra*, and *Salinger* v. *Loisel*, 265 U. S. 224, 68 L. Ed. 989, wherein this Court said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district."

There are several indications that the provisions of Article III, Section 2, above, cannot be waived. The

words "and such trial shall be held in the state where the said crimes shall have been committed" are clearly directed to the Government and not to the defendant. They constitute a limitation upon the powers of the Government with reference to place of trial, instead of conferring, as held below, an option upon the defendant. If they be interpreted to mean that a "right" is accorded the defendant, an enigma is presented as to how the defendant may avail himself of that "right." It should be noted that the provision states "where the said crimes shall have been committed," not where the said crimes shall be *alleged* to have been committed. If, therefore, this provision be interpreted as conferring a waivable right upon a defendant it leads to the conclusion that he must confess his crime before he can assert the right. Certainly no such construction seems reasonable in view of other provisions of the Constitution prohibiting compulsory self-incrimination. It is illogical to suppose that a defendant must give up one right under the Constitution in order to assert another.

The provisions of the 6th Amendment are likewise mandatory as to the place where the trial shall be had. They are likewise directed to the Government in the form of a limitation upon Governmental power. The words, "the accused shall enjoy the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed," prescribe not merely the place of trial, but the source of the jury by which the accused shall be tried. The words, "which district shall have been previously ascertained by law," are a further indication that this requirement operates retrospectively upon the Government, instead of conferring a mere privilege upon the defendant. In fact this provision of the Constitution must be violated by the Government before a defendant would ever be

in a position wherein he would be required to assert his right.

The statement by the Court below that there is no Federal criminal venue statute is no aid to that Court in its opinion. The obvious reason why no Federal criminal venue statute exists is the clear and explicit provisions of the Constitution. Congress never thought it necessary that any statute should be passed further safeguarding provisions of the Constitution which seem so clear that they are self-sufficient. Certainly until the present case no one imagined that any Federal Court could exercise a criminal jurisdiction beyond the confines of the judicial district wherein it was located, in the case of the District courts, or beyond the District of Columbia in the case of the Supreme Court of the District of Columbia.

The decision of this Court in *Patton* v. *United States, supra,* does not seem to be at variance with these views. In *Patton* v. *United States, supra,* this Court held that the jury referred to in the Constitution, Article III, Section 2, Clause 3, and the 6th Amendment meant a jury as it was understood and known at common law, the essential elements of which it described as follows:

1. It should consist of twelve men.
2. The trial should be in the presence and under the superintendence of the Judge, etc.
3. The verdict should be unanimous.

It will no doubt be conceded by this Court that it did not in so describing the elements of a constitutional and common law jury mean to characterize such elements as exclusive, *i.e.*, there might be other elements of a common law jury not mentioned in the Patton case. One such element is the familiar requirement that it should be a jury of the vicinage. Thus Mr. Justice Story says:

"It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged through a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable manner. But upon a subject so vital to the security of the citizen it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to have been committed.

* * * * * * *

It was doubtless by analogy to this rule of the common law that all criminal trials are required to be in the State where committed."

* * * * * * *

"The other article, in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or District wherein the crime shall have been committed (which District shall have been previously ascertained by law) * * * does but follow out the established course of the common law in all trials for crimes. The trial is always public * * * and in the District of the offense."

(*2 Story, The Constitution*, Section 1781, 1782, 1791.)

To the same effect is Cooley:

> "The jury must also be summoned from the vicinage where the crime is supposed to have been committed."
>
> (*Cooley, Constitutional Limitations*, 8th Ed. p. 676.)

In *Callan* v. *Wilson*, 127 U. S. 541, 549, this Court quoted with approval the remarks of Mr. Justice Story above referred to and reiterated its position that the third article of the Constitution with reference to trial by jury must be interpreted in the light of the principles which controlled at common law. This Court there said:

> "And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

That at common law a jury from the vicinage was a prerequisite is a well known historical fact. See *Hale's Pleas of the Crown*, Volume 2, Chapter 34, Page 264; *Hawkin's Pleas of the Crown*, Volume 2, Chapter 25, Section 34; *4 Black. Comm.* 305, 349, 350.

The requirement that the jury should come from the vicinage was because the jurors at first were witnesses (*2 Story, Constitution*, 561, note). Reference to the history of the Federal Convention of 1787 which framed the Constitution shows not only that the delegates were intent upon preserving trial by jury of

the vicinage (using vicinage in the sense of the vicinity or the State), but that literally no other provision was even contemplated. A full history of the deliberations leading up to the adoption of Article III, Section 2, Clause 3 of the Constitution preserving this right will be found in *Farrand's "The Records of the Federal Convention"* Volume 3, page 645, index. An account of the adoption of this provision is also contained in *Charles Warren's "The Making of the Constitution,"* page 546, 547.

As seen from the records of the convention the only discussion in the Constitutional Convention with reference to the preservation of the right of trial by jury as known at common law was in favor of preserving such right in *civil* cases; it was taken for granted it would be preserved in criminal cases.

With reference to the adoption of the 6th Amendment and the further guarantee therein of trial by jury from the State and District wherein the offense was committed, Mr. Justice Story says, referring to Article III, Section 2, Clause 3:

> "But, although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousy and alarm of the opponents of the Constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this, further auxiliary rights ought to have been secured."
>
> (*2 Story, Constitution,* Section 1782, citing *1 and 2 Elliott's Debates.*)

The history of the reason for and the adoption of the Bill of Rights is too familiar to this Court to need much mention. The causes leading up to Amendment 6, however, may briefly be adverted to.

The Colonial records attest the fact that the colonists regarded trial by jury *of the vicinity* as an absolute birth-right, based on Magna Charta. When they resisted the Stamp Act in Massachusetts they declared that for their alleged offenses they could be tried only by a jury of the vicinage. The Provincial Congress of North Carolina on August 25, 1774, passed the following Resolution:

> "Resolved that trial by juries of the *vicinity* is the only lawful inquest that can pass upon the life of a British subject, and it is a right handed down to us from the earliest ages, confirmed and sanctioned by Magna Charta itself." (Italics ours.)

In Virginia similar words were used, to the effect that "trial by jury of the vicinage" was a birth-right.

The Continental Congress in "An Address to the Inhabitants of Quebec," 1774, made clear the inalienable rights of British subjects and referred to one of them as trial "by twelve of his unexceptionable countrymen and peers of his vicinage." The reference to the same right in the Declaration of Independence is too familiar to require quotation. Trial by jury of the vicinage, a revolt against transportation beyond the seas, was one of the "sacred rights" for which the colonies went to war.

When the time came for the States to draw up their Constitutions, this right was preserved in every case. As Jeremiah S. Black said in his great argument in Ex Parte Milligan:

> "Of the great rights they threw not an atom away. They went over Magna Charta, the Petition of Right, The Bill of Rights, and the rules of the common law and whatever was found there to favor individual liberty, they carefully inserted in their own system. * * *" (*Ex Parte Milligan*, 71 U. S. 67.)

It is well known that when the Constitution, lacking a Bill of Rights, was submitted to the States, a majority of them, in ratifying, concurred in demanding that trial by jury of the vicinage be clearly secured. North Carolina and Rhode Island refused to ratify; when in November of 1789 North Carolina finally ratified, her delegates demanded this among other amendments. Congress responded to this demand by adopting what later became the 5th and 6th Amendments, which were promptly ratified by the States.

This Court has consistently interpreted trial by jury to mean trial by jury as known at common law, a view reiterated as recently as in *Patton* v. *United States, supra.* If so it is difficult to get away from the notion that it means a jury of the vicinity. Blackstone says:

> "When the defendant has entered his plea of not guilty and, for his trial, has put himself on his country, which country the jurors are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto,* that is, freeholders without just exception of the *visne* or neighborhood where the fact is committed" (*4 Black Com.* 350).

The ancient writ commanded the sheriff to summon "free and lawful men of the neighborhood" (Glanville 32). Coke says:

> "And the reason wherefor the jury must be of the neighborhood is for that "*vicinus facta vicine presumita scire*" (Coke on Littleton, 158b).

It is well known that the old Tudor Statutes, passed in the 35th year of the reign of Henry VIII, creating new treasons, and permitting their trial anywhere in the kingdom, were expressly repudiated by the Whigs.

in 1768, when they were invoked in Parliament to inquire into the alleged offenses in Massachusetts Bay. Hansard in his *Parliamentary History*, Vol. XVI, pp. 479, 494, says:

> "That part of the address which proposed the bringing of delinquents from the province of Massachusetts, to be tried at a tribunal in this kingdom for crimes supposed to be committed there, met with still greater opposition than the resolves. Such proceeding was said to be totally contrary to the spirit of our Constitution."

Though the resolution was passed, it has always been regarded, by English and Americans alike, as an historical and constitutional mistake. Trevelyan refers to it as "the sport of a night at Westminster," and refers pointedly to the opposition which "commented forcibly on the cruelty and injustice of dragging an individual three thousand miles from his family, his friends and his business * * * * to be put in peril of his life before a panel of twelve Englishmen" (*Trevelyan, American Revolution*, Part 1, pp. 102, 107).

Lecky says:

> "By virtue of an obsolete law, passed in one of the darkest periods of English history and at a time when England possessed not a single colony, any colonist who was designated by the Governor as a traitor might be carried 3,000 miles from his home, from his witnesses, from the scene of his alleged crime, from all those who were acquainted with the general tenor of his life, to be tried by strangers of the very nation against whom he was supposed to have offended" (*Lecky, Engl. 18th Cent.*, Vol. III, 394-395).

He states the threat to transport accused persons to England for trial:

"excited a fierce and legitimate indignation in America and added a new and very serious item to the long list of colonial grievances" (*Lecky, supra*).

The reaction in the Colonies was immediate and extreme. The North Carolina Resolution of August 25, 1774, in favor of "trial by juries of the vicinity" has already been mentioned. The Constitutional Congress in its Address to the People of Great Britain "again denounced transportation abroad for trial." In South Carolina, William H. Drayton protested vigorously against invasion of the rights of the Colonies "By declaring that the people of Massachusetts Bay are liable for offenses or pretended offenses done in that colony to be sent to and tried for the same in England, or in any colony, where they cannot have the benefit of a jury of the vicinage." In Virginia they declared that among the Colonists inalienable Constitutional rights was "trial by jury of the vicinage."

It is not too much to say that all the colonies were up in arms over the invasion of the right and made "the cause of Massachusetts Bay the cause of all."

In New Hampshire it was declared:

> "In criminal prosecutions, the trial of facts *in the vicinity where they happen* is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried *in any other county than that* in which it is committed."

Eminent commentators on the Constitution ratify the historical sources. Jeremiah S. Black says:

> "His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they

mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the Court" (*Ex Parte Milligan*, 71 U. S. 68).

Cooley says:

"No one doubts that a trial by a jury of the vicinage is as complete and certain now as it ever was and that, in America, it was indefeasible" (*Swart* v. *Kimball*, 43 Mich. 443).

In *Trial by Jury* (Sec. 387), Justice Moschzisker, referring to the Constitutional guarantee, states that a substantial requirement is that the jurors be "chosen from the vicinage."

Justice Caldwell in *Trial by Judge and Jury*, says with reference to the Constitutional provisions:

"When the several provisions of the Constitution are read in connection we are amazed at their fullness and completeness. No more resolute and inexorable purpose to accomplish a particular end ever found expression" (The American Federationist, May, 1910).

Watson on the Constitution, after referring to Article III, Section 2, Clause 3, and the 6th Amendment states, with reference to the latter:

"This provision forbids an indictment in one State for a crime committed in another" (2 Watson on the Constitution, 1144).

The following cases are cited:

In re Rosdeicher, 33 F. 657, 658;
U. S. v. *Conrad*, 59 F. 458.

In *Armour Packing Co.* v. *United States*, 153 F. 1, 6, the Sixth Amendment is referred to as stating "the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdic-

tion in which the offense was committed." The Court in that case freely conceded and confirmed the position that if the offense of the defendant therein was committed in another State the court was without jurisdiction.

In *United States* v. *Jackalow*, 1 Black, 484, it was held that a circuit court had no jurisdiction of a crime committed in any other state than the one wherein the Court was sitting.

Hare in his Constitutional Law after referring to the desire of the people of the United States for a further safeguard, in addition to the Constitution, such as the English Bill of Rights, and the enactment of such safeguards in our own Bill of Rights, says:

> "One of these guarantees is noteworthy from the importance of the principle, and the care with which it was enforced. Agreeably to the Constitution, Article III, Section 2, the trial of all crimes, except in cases of impeachment, shall be by jury, and such trials shall be had in the State where such crimes shall have been committed,—plain words, which might seem ample to convey the idea. But so earnest was the country on this head that the guaranty was reiterated in the amendments" (*1 Hare*, 506-507).

The author the quotes the Sixth Amendment.

Chaplin, in *Principles of the Federal Law*, p. 591, states:

> "Features of jury trial, relating peculiarly to criminal cases, are: . . . adoption, in substance (for State area), by the Venue provisions of the Constitution (Art. III, Sec. 2, Amend. 6) of the Common Law principles of trial by the vicinage (with substitution of the State, and the Federal District, for the Common Law county)."

The authorities above cited seem unanimous in holding that a jury *of the vicinage* is an essential fundamental right and that historically, trial by jury meant a jury *of the vicinage*. The matter is important because in the present case *petitioners demanded a trial by jury*. The question thus confronting this Court is: What kind of a jury are they to obtain? Are they to have a jury from the vicinage as would seem their right, or are they to be put off by an extension of the waiver doctrine of *Patton* v. *United States, supra*, with some sort of a hybrid jury, not from the State and district wherein the crime was committed, as provided by the Constitution, but one summoned inadvertently by the trial court, and sustained by the Court below for the after-discovered exigencies of this particular case?

This point will next be discussed.

V.

Even Assuming the Constitutional Provisions Could Be Waived, Petitioners Did Not in the Present Case Waive Them.

To sustain the theory of the Court below, not one, but two waivers, are necessary. First, the petitioners must "waive" their "right" to be tried in Pennsylvania under Article III, Section 2, Clause 3, of the Constitution. Second, they must waive the provision of Amendment 6 to the effect that the jury must come from the State and District wherein the crime was committed. Assuming, for the sake of argument, that by pleading not guilty, petitioners waived their right to be tried in Pennsylvania, it seems a far cry to counsel to hold that in so pleading not guilty, and demanding a jury trial, in the old phrase "putting themselves

on the country," they expressed their willingness to be satisfied with less than a constitutional jury. It is true that as the jury was chosen, petitioners could have objected on the ground that they were not residents of Pennsylvania; however, it must be remembered that the alleged waiver in the present case is a waiver of the jury by implication, *i.e.*, an Appellate Court over a year after the trial concludes they waived their right on the basis of this Court's decision in *Patton* v. *United States, supra*, which had not even been decided when these petitioners were tried. The matter here involved is a striking illustration of the murky legal situation which results from the theory of waiver by implication and shows the foresight and good judgment of the caution contained in the last paragraph of *Patton* v. *United States, supra*, against courts doing precisely what was done herein.

In the present case petitioners filed a motion in arrest of judgment (R. 3-4), setting up clearly the lack of jurisdiction of the Court (R. 4).

A motion in arrest of judgment is the proper way to bring to the court's attention a jurisdictional defect:

Wharton's Criminal Procedure, Sec. 1692;
Sadler's Criminal Procedure, Sec. 516;
U. S. v. *Marvin*, 159 F. 767;
U. S. v. *Maxey*, 200 F. 997;
U. S. v. *Moore*, 288 F. 251;
16 C. J., Sec. 2770, 2773;
Demolli v. *U. S.*, 144 F. 363;
Bond v. *Dustin*, 112 U. S. 604;
Carter v. *Bennett*, 15 How. 354;
Black on Judgments, Vol. I, Sec. 98.

It is well known that in a Federal Court the lack of jurisdiction of the Court over the subject matter may be raised at any time and that jurisdiction cannot be conferred by consent of the parties.

Jackson v. *Ashton*, 8 Peter's 148.

Lack of jurisdiction of the Federal Court may be raised not only at any time during the trial but even in an Appellate Court.

Sullivan v. *Fulton Steamboat Co.*, 6 Wheat. 450;
Jackson v. *Ashton*, 8 Pet. 148;
Grace v. *American Central Insurance Co.*, 109 U. S. 278;
Robertson v. *Cease*, 97 U. S. 646;
Bors v. *Preston*, 111 U. S. 252;
Mansfield R. Co. v. *Swan*, 111 U. S. 379;
Gainesville v. *Brown-Crummer*, 277 U. S. 54.

In fact this Court has frequently said that it is the duty of the Court itself before which the case comes, whether the trial court or the appellate court, to satisfy itself that upon the record facts appear giving it jurisdiction.

Grace v. *American Central Insurance Co., supra,* and cases above cited.

If, therefore, petitioners by their Motion in Arrest of Judgment, asserted the lack of jurisdiction of the trial court, it is difficult to perceive how it can be argued that on the basis of the Patton case they gave their consent. On the basis of the previous decisions of this Court, if it be a question of jurisdiction, *they could not give their consent;* even if they gave it, it would be ineffective.

Assuming *arguendo* that the question herein is not one of jurisdiction but something less than that, there is nothing in this Court's decision in the Patton case to indicate that this Court intended to overrule its previous decision in *Thompson* v. *Utah*, 170 U. S. 353, to the effect that the defendant could not by mere silence effect a waiver of a constitutional right. With reference to *Thompson* v. *Utah*, this Court in its decision in the Patton case said:

"The case involved the validity of a statute dispensing with the common law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, *but only that he had not objected until after verdict.* The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute." (*Patton* v. *U. S.*, 281 U. S. 276, 293). (Italics ours.)

It may be noted that in the present case the defendants, as in *Thompson* v. *Utah*, did not consent to the trial but only *did not object* until after the verdict (R. 3-4).

VI.

The Decision Below Seems Flatly Violative of the Spirit of This Court's Decision in the Patton Case.

In the Patton case this Court had before it an express waiver of a constitutional right entered into between the parties, who were assisted by the advice of counsel. In the present case there is an alleged waiver *by implication* of a constitutional right. It should be remembered that the trial of the present case was concluded prior to the decision of this Court in *Patton* v. *U. S.*, *supra*, at a time when defendants had a right to rely upon their constitutional rights as they were then interpreted. Certainly, prior to the Patton case, it was the opinion of most lawyers that, under *Thompson* v. *Utah*, *supra*; *Low* v. *United States*, 169 F. 86, and *Dickinson* v. *United States*, 159 F. 801, defendants in a criminal case could not waive the requirements of a common law jury with respect to number and

inferentially could not waive the other requirements of a common law jury set forth in Amendment 6 of the Constitution.

It seems to counsel that it is a fair inference from this Court's decision in *Patton* v. *United States* that waivers by implication of constitutional rights with respect to a jury trial are not to be entertained. Thus, the words of this court in *Patton* v. *United States:*

> "Before any waiver can become effective, the consent of Government counsel and the sanction of the Court must be had, *in addition to the express and intelligent consent of the defendant*" (281 U. S. 312; italics ours),

seem to require an express waiver. The further remark by this Court:

> "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advisable discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof" (281 U. S. 312, 313),

seems adverse to a waiver by implication.

The waiver of the requirement of Amendment 6 that the source of the jury should be the State and District wherein the crime was committed, which is a restatement of the common law requirement, is on the same footing with the common law requirement, carried into the Constitution by implication, that the normal trial jury should be composed of twelve. If so, the caution of this Court contained in *Patton* v. *United States* against indiscriminate waivers of a jury of twelve would apply with equal force to a waiver of the requirement of Amendment 6 that the jury must be one of the vicinage.

Conclusion.

The judgment below should be reversed.

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APPENDIX I.

The Code of the District of Columbia (complete to March 4, 1929), title 18, sec. 43, provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a court of the United States." Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; Mar. 3, 1911, 36 Stat. 1167, c. 231, sec. 289.)
>
> "44.—*Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District and of all cases in law and equity between parties, * * *."

Section 43 above was derived from the Act of March 3, 1863, 12 Stat. 762, c. 91, which established the Supreme Court of the District of Columbia, and provided that any one of the Justices thereof might hold special terms of the said court. Section 3 then provides:

> "Sec. 3. * * * Any one of said Justices may also hold a criminal court for the trial of all crimes and offenses *arising within said District*, which court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia."

The "Criminal Court of the District of Columbia" referred to in the last sentence above was originally constituted by the Act of February 27, 1801 (Davis' Laws, District of Columbia, 1831, p. 124), Sec. 5 of which reads as follows:

> "Sec. 5. *Be it further enacted*, That said court shall have cognizance of all crimes and offenses

committed within said District, and of all cases in law and equity, etc."

The "criminal" court was constituted and named as such by Sec. 1, Chap. 128 of the Revised Code of the District of Columbia, 1857, Revision of Ould and Cross, Sec. 4, provided as follows:

> "Sec. 4. The Criminal Court shall, except when otherwise expressly provided by law, have exclusive jurisdiction in the trial and punishment of all crimes and offenses *committed within the District.*"

Returning to the amendments to Sec. 43 above, the Act of March 3, 1901, 31 Stat. 1199, c. 854, Sec. 61, provides:

> "Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia at the date of the passage of this Code."

This provision was further amended by the Act of June 30, 1902, 32 Stat. 522, c. 1329, by adding after the words "District of Columbia" in Sec. 61 above, the words:

> "Under the Act of Congress, approved March 3, 1863, creating that court, and."

The last amendment to this section made by the Act of March 3, 1911, 36 Stat. 1167, Chap. 231, Sec. 289, is simply the familiar statute abolishing the Circuit Courts and providing for the transfer of their records to the District Courts.

Sec. 44 was originally Sec. 763 of the Revised Statutes relating to the District of Columbia and read as follows:

"Sec. 763. Any one of the Justices may hold a criminal court for the trial of all crimes and offenses *arising within the District.*"

This section was amended by the Act of February 27, 1877, 19 Stat. 253, c. 69, Sec. 2, as follows:

"Section seven hundred and sixty-three is amended by striking out said section and inserting in lieu thereof the following as section seven hundred and sixty-three;"

"Said courts shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties * * *."

A further amendment was made by Act of March 3, 1901, 31 Stat., p. 1202, Sec. 83, reading as follows:

"Sec. 83. *The Criminal Court.*—The trial of crimes and misdemeanors *committed in the District of Columbia* shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court, * * *."

As above noted, the words "except as otherwise provided in this title" in Sec. 44 above, refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia, conferred in Chap. 4 and Chap. 6 of this title. The words "except as otherwise provided in this title" are not found in any of the Acts of Congress from which Sec. 44 is derived and are apparently the addition of the codifier.

(Italics throughout are those of counsel herein.)

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 590

HERMAN O. HAGNER AND JULIA C. HAGNER, petitioners

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the issuance of a writ of certiorari in this case.

OPINIONS BELOW

The Supreme Court of the District rendered no opinion, but its order overruling defendants' motion for a new trial and in arrest of judgment (R. 5–6) is in the record. The opinion of the Court of Appeals (R. 12–19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 23, 1931. (R. 19.) A petition for rehearing was denied December 5, 1931. (R. 20.) The petition for certiorari was filed December 24, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case can waive the requirements of Article III, Section 2, of the Constitution that the trial of crimes "shall be by jury; * * * in the State where the said crime shall have been committed," and the provisions of the Sixth Amendment that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

2. If the constitutional provisions mentioned may be waived, whether they were waived in this case when the defendants failed to file a plea to the jurisdiction and raised the question for the first time by motion in arrest of judgment.

3. Whether under the provisions of Section 44 of the Code of the District of Columbia the jurisdiction of the Supreme Court of the District in criminal cases is limited to crimes and offenses committed within the District.

STATUTES INVOLVED

The Code of the District of Columbia (Ed. March 4, 1929, Title 18, Secs. 43 and 44) provides:

> 43. *Jurisdiction; powers of circuit and district courts conferred.*—The said court shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States. (Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; Mar. 3, 1911, 36 Stat. 1167, c. 231, sec. 289.)
>
> 44. *Same; general jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, * * *.

STATEMENT

The petitioners were indicted and tried in the Supreme Court of the District of Columbia for violating Section 215 of the United States Criminal Code. (U. S. C., Title 18, Section 338.) The indictment alleged that at the District of Columbia defendants devised a scheme to defraud which it described in some detail and then averred that the defendants, for the purpose of executing said scheme, placed and caused to be placed in the post office at Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States, certain described mail matter. (R. 1–3.)

No question was raised by petitioners as to the jurisdiction of the trial court until after they were found guilty by the jury when they moved in arrest of judgment, one of the grounds of the motion being that the indictment showed on its face that the trial court had no jurisdiction because the indictment failed to show the commission of any crime within the jurisdiction of the trial court. (R. 4–5.) The motion was denied. (R. 5–6.) The petitioners appealed to the Court of Appeals of the District of Columbia. That Court affirmed the judgment of conviction, holding that the defendants had waived their constitutional privilege to refuse to be tried in the District of Columbia by failing to object seasonably to the jurisdiction of the trial court. (R. 13–19.)

DISCUSSION

This case presents several questions of general importance which appear to be worthy of review in this Court. Accordingly, we do not oppose the issuance of the writ of certiorari.

Respectfully submitted.

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Solicitor General.

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Assistant Attorney General.

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Special Assistant to the Attorney General.

JANUARY, 1932.

U.S. GOVERNMENT PRINTING OFFICE: 1932

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 590

HERMAN O. HAGNER AND JULIA C. HAGNER, petitioners

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The Supreme Court of the District of Columbia rendered no opinion. The opinion of the Court of Appeals (R. 10–17) is reported in 54 F. (2d) 446.

JURISDICTION

The judgment of the Court of Appeals was entered November 23, 1931. (R. 17.) A petition for rehearing was denied December 5, 1931. (R. 18.) The petition for certiorari was filed December 24, 1931, and was granted January 25, 1932.

(R. 29.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

1. Whether an indictment which charged that the defendants caused to be placed in the post office at the city of Scranton, in the State of Pennsylvania certain described mail matter to be sent and delivered by the post office to the addressee in Washington, D. C., is sufficient, after verdict, to charge an offense committed in the District of Columbia.

2. Whether a defendant in a criminal case may waive the requirements of Article III, Section 2, of the Constitution that the trial of crimes "shall be by Jury; * * * in the State where the said Crimes shall have been committed," and the provisions of the Sixth Amendment that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

3. If the constitutional provisions mentioned may be waived, whether they were waived in this case when the defendants failed to file a plea to the jurisdiction and raised the question for the first time by motion in arrest of judgment.

4. Whether the jurisdiction of the Supreme Court of the District in criminal cases is limited by

statute to the trial of crimes and offenses committed within the District.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix, *infra*, pp. 44–49.

STATEMENT

The petitioners were indicted and tried in the Supreme Court of the District of Columbia for violating Section 215 of the Criminal Code (U. S. C., Title 18, Section 338; *infra*, pp. 48–49). The indictment alleged that at the District of Columbia the defendants devised a scheme to defraud, which it described in some detail and then averred that the defendants, for the purpose of executing said scheme (R. 2)—

> did place and cause to be placed in the Post Office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N. W., Washington, D. C. * * *

Upon their arraignment the petitioners entered pleas of not guilty, without questioning the sufficiency of the indictment either as to its form or substance, and thereafter voluntarily proceeded to

trial without objecting to the jurisdiction of the court to hear and determine the issues raised by their pleas of guilty. (R. 3, 7, 8.) The jury found them guilty as indicted, whereupon each moved in arrest of judgment and for a new trial. (R. 8.) These motions being denied, sentence followed (R. 8), and the defendants appealed to the Court of Appeals of the District of Columbia, assigning as the only error the refusal of the court to sustain the motion in arrest of judgment. (R. 7.)

The record in this Court and in the court below includes the indictment, the arraignment and pleas, the motion in arrest of judgment and order overruling same, and the entries appearing upon the Court's docket. So far as the record shows, no question was raised either as to the sufficiency in form or in substance of the indictment, or as to the jurisdiction of the court to determine the issues raised by the pleas of not guilty, until the motion in arrest of judgment was made after verdict. There is no bill of exceptions, and therefore neither the evidence presented upon the trial nor the instructions of the court to the jury appear in the record.

The court below affirmed the judgment of conviction, holding that while the defendants might by a seasonable plea to the jurisdiction have avoided trial in the Supreme Court of the District of Columbia under the indictment, their submission to that court waived the privilege accorded them by Article III, Section 2, of the Constitution, and in

such circumstances they may not, after trial and conviction, for the first time object to that court's jurisdiction. (R. 17.)

SUMMARY OF ARGUMENT

I

The indictment sufficiently charged an offense committed within the District of Columbia. While the indictment did not use the precise language of the statute in charging delivery in the District of Columbia of matter which had been placed in the post office at Scranton, Pennsylvania, it did charge the mailing of a letter to be sent and delivered to the addressee in the District of Columbia. Delivery is presumed from the fact of mailing, and considering the indictment with the reasonable implications from its language, it sufficiently charged delivery in the District of Columbia.

Even if the indictment was formally defective, the formal defects ought to be disregarded under the provisions of Section 1025 of the Revised Statutes. The petitioners were fully informed of the charges against them, and apparently went to trial in the belief that they were charged with an offense committed within the District of Columbia. The objection to the indictment, being raised after verdict, came too late, since the deficiency in the indictment, if any, was only technical. Furthermore, if there was any defect in the indictment, it should be disregarded under the provisions of Section 269 of the Judicial Code as amended.

II

Assuming that the indictment does not state an offense committed within the District of Columbia, the petitioners have waived their privilege to be tried at the place where the offense was committed. The provisions of Article III, Section 2, Clause 3, of the Constitution and the Sixth Amendment have substantially the same meaning. This Court decided in *Patton* v. *United States*, 281 U. S. 276, that the provisions of Article III, Section 2, are not jurisdictional. These provisions confer personal rights, which, like the right to trial by jury and other constitutional rights, may be waived.

By failing to make any objection before verdict, and by waiting to see what the verdict would be before raising the question, the petitioners waived their privilege to insist on trial in another place. Failure to object in a civil case constitutes a waiver, and the authorities indicate that a similar failure in a criminal case may amount to a waiver. Petitioners were represented by counsel, and must be deemed to have acted with knowledge of their constitutional privileges, and their failure to object, therefore, was a waiver intelligently made of these privileges.

III

The Supreme Court of the District of Columbia had jurisdiction to try this case. The Supreme Court of the District is vested with all the power and jurisdiction of a District Court, and in the trial of crimes against the United States which

would elsewhere be tried in a District Court, the Supreme Court sits as a District Court. Numerous decisions recognize that the Supreme Court of the District has all the powers of a District Court. There is no territorial limitation upon the jurisdiction of the District Courts, and, accordingly, none upon the jurisdiction of the Supreme Court of the District as a District Court other than Article III, Section 2, and the Sixth Amendment of the Constitution. Since the constitutional privileges of the petitioners were waived, the Supreme Court of the District had jurisdiction to try these cases.

ARGUMENT

I

THE INDICTMENT IS SUFFICIENT AFTER VERDICT TO CHARGE THE OFFENSE OF CAUSING A LETTER TO BE DELIVERED BY MAIL IN THE DISTRICT OF COLUMBIA, WHICH IS AN OFFENSE WITHIN THE JURISDICTION OF THE TRIAL COURT

Section 215 of the Criminal Code (*infra*, pp. 48–49) is the section making it an offense to use the mails in the execution of a scheme to defraud. It provides in part as follows:

> Whoever, having devised * * * any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post-office * * * to be sent or delivered by the post-office establishment of the

> United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter [shall be fined or imprisoned].

It is plain from the wording of this statute that it is an offense against the United States to cause a letter to be delivered in the execution of a scheme to defraud, and this Court has held that the offense may be prosecuted at the place where the letter is delivered. *Salinger* v. *Loisel*, 265 U. S. 224; *Salinger* v. *United States*, 272 U. S. 542. We contend that the indictment involved in this case is sufficient, at least after verdict, to charge the offense of causing a letter to be delivered in the District of Columbia in the execution of a scheme to defraud. And in the alternative we contend that whatever defects there may be in the indictment are cured by (1) Section 1025 of the Revised Statutes (*infra*, p. 45), (2) the fact that the objection was not raised until after verdict, and (3) the provisions of the Act of February 26, 1919, amending Section 269 of the Judicial Code (*infra*, p. 49).

A. *The indictment states facts sufficient to show the commission of an offense in the District of Columbia*

The indictment in this case (R. 1–3) alleges that the petitioners devised a scheme to defraud and that in the execution of this scheme they (R. 2):

> did place and cause to be placed in the Post Office at the City of Scranton, in the State

> of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N.W., Washington, D. C. * * *.

The petitioners' contention in substance is that this indictment fails to charge an offense in the District of Columbia because it does not use the formal words of the statute, namely, did "cause to be delivered" in the District of Columbia. The indictment does in so many words charge that the defendants did "cause to be placed * * * to be sent and delivered * * * to the addressee" a letter addressed to the District of Columbia. The substance and effect of the words in the indictment are to charge an offense in the District of Columbia, although the precise words of the statute were not used. An indictment for using the mails to defraud need not follow the exact language of the statute. *Olsen* v. *United States,* 287 Fed. 85 (C. C. A. 2d).

The indictment at least charges the mailing of a letter addressed to the District of Columbia. It is common knowledge and experience that the mailing of a letter addressed to a particular place almost invariably results in causing that letter to be delivered to its address. This Court has clearly recognized this fact and has stated it in the form

of a presumption. In *Rosenthal* v. *Walker*, 111 U. S. 185, 193, it was said:

> The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

See also *Dunlop* v. *United States*, 165 U. S. 486, 495; *United States* v. *Kenofskey*, 243 U. S. 440.

The rule thus announced has been followed by the lower Federal courts in numerous decisions.[1] Thus the delivery of the letter in the District of Columbia was a reasonable implication from facts clearly charged. "Reasonable implications from facts clearly charged may be indulged in ascertaining the true meaning of an indictment." *Ex parte Pierce*, 155 Fed. 663, 665 (C. C. E. D. Mo.), affirmed, *Pierce* v. *Creecy*, 210 U. S. 387; *United States* v. *Barber*, 157 Fed. 889 (W. D. Wis.).

The language of the indictment, coupled with the plain implication that by mailing the letter the peti-

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[1] *United States* v. *Rice*, 281 Fed. 326, 330 (S. D. Tex.); *Ex parte Bergdoll*, 274 Fed. 458, 466 (D. Kan.); *United States* v. *General Inspection & Loading Co.*, 204 Fed. 657, 658 (D. N. J.); *Davidson S. S. Co.* v. *United States*, 142 Fed. 315, 318 (C. C. A. 8th); *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774, 777 (C. C. A. 2d); *First Nat. Bank* v. *Fourth Nat. Bank*, 56 Fed. 967, 969 (C. C. A. 6th); *Anderson* v. *Saint*, 46 Fed. 760, 766 (C. C. W. D. Pa.).

tioners caused the letter to be delivered in the District of Columbia, was sufficient to warrant the submission of the case to the jury under instructions that delivery in the District was an essential ingredient of the crime. In the absence of any bill of exceptions containing the testimony and the court's instructions to the jury, it must be assumed that the court so construed the indictment, instructed the jury accordingly, and that the jury found on sufficient evidence that the letter was delivered in the District. *Dunham* v. *United States,* 289 Fed. 376, 379 (C. C. A. 5th); *Katz* v. *United States,* 273 Fed. 157, 159 (C. C. A. 1st), certiorari denied, 257 U. S. 641; *McCarty* v. *United States,* 101 Fed. 113 (C. C. A. 8th).

B. *Any defects in the indictment are cured by Section 1025 of the Revised Statutes*

Congress has declared in no uncertain terms that indictments are to be judged by their substance, and not by their form. Section 1025 of the Revised Statutes (*infra,* p. 45) provides:

> No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

This provision has been frequently applied by the courts, and we submit that the present indictment falls plainly within its terms. In *Dunbar* v. *United States*, 156 U. S. 185, 192, this Court upheld an indictment by authority of this statute, and stated that the provision—

> is applicable where the only defect complained of is that some element of the offence is stated loosely and without technical accuracy.

The defendants knew that they had been indicted in the District of Columbia. They knew that, if they objected, they could not be tried in the District of Columbia for an offense which was not committed within the District. The indictment charged them with acts which undoubtedly caused the letters to be delivered within the District, and it must be presumed that such delivery was found under proper instructions from the court. There is no contention that the petitioners were surprised at the trial or that they were not ready or were unable properly to present their defense. We believe that the situation is covered by the decision of this Court in *Lamar* v. *United States*, 241 U. S. 103, 116–117, where this Court said:

> It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, nor is there any intimation that any request was made for a bill of particulars

concerning the details of the offense charged. Under this situation we think that the case is clearly covered by § 1025, Revised Statutes.

The indictment plainly informed the petitioners of the acts with which they were charged, namely, mailing a letter in Scranton to be delivered to the addressee in Washington—in other words, by mailing it, causing it to be delivered to the addressee. If this be not the literal charge it is plainly to be implied and must have been so understood. The question raised is purely one of form within the ambit of Section 1025 of the Revised Statutes. That section has frequently been applied in situations similar to the present case. Thus, in *Fenour* v. *United States*, 14 F. (2d) 888 (C. C. A. 3d), an indictment for using the mails to defraud was upheld, although it contained inaccurate allegations that certain transactions were between certain companies. In *Olsen* v. *United States*, 287 Fed. 85 (C. C. A. 2d), an indictment for using the mails to defraud was held sufficient, in view of Sec. 1025 of the Revised Statutes, although it failed to allege that the matter deposited was to be sent or delivered by the post office establishment of the United States. In *Grandi* v. *United States*, 262 Fed. 123 (C. C. A. 6th), an indictment charging the defendant with receiving goods in interstate commerce, knowing the same to have been stolen, was held valid although it did not directly allege that the goods had been stolen. And in *Bloch* v. *United States*, 261

Fed. 331 (C. C. A. 6th), certiorari denied, 253 U. S. 492, an indictment for stealing goods from an interstate shipment was upheld under Section 1025 although it did not directly allege the ownership of the goods. Section 1025 has found application in numerous other instances.*

C. *The petitioners' objection to the indictment, made for the first time after verdict, comes too late*

Although the allegations in the indictment may not be as full or complete as they might be, and assuming for the purpose of argument that the indictment might have been objectionable on demurrer or motion to quash, we submit that whatever defects there may have been can not avail the petitioners at this stage of the proceeding. The petitioners made no attack on the indictment prior to the trial. It was not until after a verdict of guilty had been rendered against them that they raised the question which they now present through a motion in arrest of judgment, which is addressed solely to the sufficiency of the indictment, does not question the sufficiency of the proofs to show a crime

*The following cases may be referred to as examples: *Dunbar* v. *United States*, 156 U. S. 185; *Holt* v. *United States*, 218 U. S. 245; *Boehm* v. *United States*, 6 F. (2d) 497 (C. C. A. 7th); *Phipps* v. *United States*, 251 Fed. 879 (C. C. A. 4th); *Kessler* v. *United States*, 237 Fed. 8 (C. C. A. 8th); *Hanks* v. *United States*, 283 Fed. 878 (C. C. A. 6th); *Rosenfield* v. *United States*, 272 Fed. 469 (C. C. A. 7th); *Wright* v. *United States*, 168 Fed. 805 (C. C. A. 5th), certiorari denied, 181 U. S. 630.

actually committed in the District, and does not assert that the jury did not find that the letters were delivered in the District of Columbia.

It is settled in many decisions of the courts that defects in the form of an indictment which can not have misled the defendant are cured by the failure to object until after a verdict has been rendered. In *Holmgren* v. *United States*, 217 U. S. 509, 523, this Court referred to Section 1025 of the Revised Statutes, *supra*, and held that where the question was not raised until after verdict "it is too late to urge such objections to a matter of form unless it is apparent that it affected the substantial rights of the accused." Similar holdings have been made in many cases.*

D. *If there is any defect in the indictment it should be disregarded because of the provisions of Section 269 of the Judicial Code as amended*

The Act of February 26, 1919 (*infra*, p. 49) amended Section 269 of the Judicial Code by adding to that section the following sentence:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire

*See, for example, *Serra* v. *Montoya*, 204 U. S. 470; *Rosen* v. *United States*, 161 U. S. 29, 33; *Wilson* v. *United States*, 275 Fed. 307, 311 (C. C. A. 2d), certiorari denied, 257 U. S. 649; *McGrath* v. *United States*, 275 Fed. 294 (C. C. A. 2d); *Montoya* v. *United States*, 262 Fed. 759, 760 (C. C. A. 8th); *Nemoof* v. *United States*, 209 Fed. 911 (C. C. A. 3d).

> record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

We believe that this provision is specifically applicable to the instant case. In *Horning* v. *District of Columbia,* 254 U. S. 135, this Court affirmed a judgment of conviction against a defendant, although the trial judge had used the following extremely strong language in charging the jury: "Of course, gentlemen of the jury, I can not tell you, in so many words, to find defendant guilty, but what I say amounts to that." (254 U. S. at 140.) This Court said (p. 139):

> If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt. Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087.

In that case the defendant contended that the action of the judge had deprived him of his constitutional right to a trial by jury. It was held that under the circumstances the error was purely formal. Similarly, we contend that in this case the error, if any, in failing to state more specifically the offense with which the petitioners were charged was purely formal, and that since the Act of February 26, 1919, at least, it should not be ground for reversal.

The lower Federal courts have frequently applied this amendment to Section 269 of the Judicial Code to situations similar to that involved in the instant case. Thus it has been held that convictions should not be reversed because of manifest clerical error in the indictment. *Appell* v. *United States,* 29 F. (2d) 279 (C. C. A. 5th); *Lund* v. *United States,* 19 F. (2d) 46 (C. C. A. 8th); *Gay* v. *United States,* 12 F. (2d) 433 (C. C. A. 5th), certiorari denied, 273 U. S. 705; *Goldberger* v. *United States,* 4 F. (2d) 10 (C. C. A. 3d). Similarly it has been held that an indictment for conspiracy, which through the use of one word instead of another failed legally to charge a conspiracy, was sufficient to sustain a conviction when the question was raised for the first time in the appellate court. *Miller* v. *United States,* 4 F. (2d) 228 (C. C. A. 7th), certiorari denied, 268 U. S. 692. And an indictment for subornation of perjury was held sufficient under this statute although it failed to allege that the perjury was committed willfully. *Link* v. *United States,* 2 F. (2d) 709 (C. C. A. 6th).[4]

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[4] Some of the other cases applying this statute in criminal cases are *Lewis* v. *United States*, 38 F. (2d) 406 (C. C. A. 9th); *Kercheval* v. *United States*, 36 F. (2d) 766 (C. C. A. 5th), certiorari denied, 281 U. S. 745; *Stetson* v. *United States*, 257 Fed. 689 (C. C. A. 6th); *Grandi* v. *United States*, 262 Fed. 123 (C. C. A. 6th); *Lockhart* v. *United States*, 264 Fed. 14 (C. C. A. 6th), certiorari denied, 254 U. S. 645; *Harrington* v. *United States*, 267 Fed. 97 (C. C. A. 8th); *Grant* v. *United States*, 268 Fed. 443 (C. C. A. 6th), certiorari denied, 256 U. S. 700; *Wagman* v. *United States*, 269 Fed. 568 (C. A. A. 6th), certiorari denied, 255 U. S. 572.

The petitioners' objection to the indictment is purely formal. They knew exactly the nature of the offense with which they were charged, and they knew it was an offense committed within the District of Columbia. They must have gone to trial on that basis. They took part in an extended trial, lasting from March 18, 1930, through March 31, 1930 (R. 8), and at no time did they make any objection either to the venue or on the ground that they were not properly informed as to the nature of the charge against them.[5] These facts make it plain that the contention now raised by the petitioners relate to matters of form only which did "not tend to the prejudice of the defendant" nor "affect the substantial rights of the parties." Under these circumstances we contend that the decisions of this Court and the mandates of Congress that purely technical errors must be disregarded, expressed in Section 1025 of the Revised Statutes and Section 269 of the Judicial Code, as amended, require the affirmance of the judgment below.

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[5] The situation is the same as that involved in *Nemcof* v. *United States*, 202 Fed. 911 (C. C. A. 3d), where the court said:

"The controversy affords an excellent example of trial with limited liability, for it is clear that, if sentence could never be imposed on the indictment, the defendants ran no real risk in taking the chance of a favorable verdict."

If the petitioners had been acquitted on the indictment in the present case, it would have barred a subsequent prosecution. *United States* v. *Ball*, 163 U. S. 662.

II

THE PETITIONERS HAVE WAIVED THEIR CONSTITUTIONAL RIGHT, IF ANY, AS TO THE PLACE OF TRIAL

A. *The provisions in Article III, Section 2, and in the Sixth Amendment of the Federal Constitution are not jurisdictional, but only confer personal rights which may be waived*

Article III, Section 2, Clause 3, of the Constitution (*infra*, p. 44) provides:

> The Trial of all Crimes * * * shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; * * *.

The Sixth Amendment of the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

These two provisions have substantially the same meaning, and the latter, although it differs somewhat in its language and is more detailed, is regarded as reflecting the meaning of the former, and does not alter or modify its effect. *Patton* v.

United States, 281 U. S. 276, 298; *Callan* v. *Wilson*, 127 U. S. 540, 549. This Court has definitely decided that these provisions confer a privilege on the accused which may be waived and are not jurisdictional requirements. In the *Patton* case, *supra*, this Court said (p. 298):

> Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement.

Although in that case the court was considering the waiver of the right to trial by jury, the language is not qualified to apply only to the part of the section dealing with that subject, and no reason is apparent why it should be so restricted.

One of the causes of the separation from England set forth in the Declaration of Independence was "For transporting us beyond Seas to be tried for pretended offences." The fear induced by this practice was still present in the minds of the people at the time of the adoption of the Constitution. They feared a strong government extending beyond the borders of their respective States, believing that it might become an instrument of oppression such as England had been in the past. The Sixth Amendment was intended to guarantee to the citizens the *right* to a fair trial in criminal prosecutions at the place where the offense charged was

alleged to have been committed, so that they could not be transported a great distance from such places against their wills and arbitrarily punished for "pretended offences." Similar reasons for the protection of the individual led to the adoption of the remaining of the first ten Amendments. These Amendments were adopted at substantially the same time and the provisions of one should be considered in its relation to all. The Ninth Amendment provides that—

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

This statement, coming after the specific provisions in the preceding eight Amendments, clearly indicates that the Amendments dealt with individual *rights,* not with jurisdictional limitations. The rights, having been conferred for the benefit of the individual, may be waived. As was pointed out in *Patton v. United States, supra,* pp. 305–306, the public interest in their preservation is not such that the consent of the individual to abandon them will be overridden.

The decisions of this Court have consistently sustained the above construction of the first ten Amendments. Even the right to a trial by jury in a criminal prosecution, probably the most cherished privilege in Anglo-American law, may be waived. *Patton* v. *United States, supra.* Others in the same category are the right against being put in jeopardy twice for the same offense, *Trono* v.

United States, 199 U. S. 521; the right to a speedy trial, *Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th), certiorari denied, 266 U. S. 626; and the right to be confronted by witnesses for the Government, *Diaz* v. *United States,* 223 U. S. 442. If the defendant in a criminal case takes the witness stand, he may be cross-examined as to his testimony, *Fitzpatrick* v. *United States,* 178 U. S. 304; *Powers* v. *United States,* 223 U. S. 303; and the privilege against unlawful searches and seizures may be waived, *Rossini* v. *United States,* 6 F. (2d) 350 (C. C. A. 8th).

With respect to the right to trial in the district where the crime is alleged to have been committed, granted by Article III, Section 2, and the Sixth Amendment, a question similar to that involved in this case was decided in *United States* v. *Rosenstein,* 34 F. (2d) 630 (C. C. A. 2d). It appeared there during the course of the trial in the Southern District of New York that one of the jurors who had been accepted by the parties was not a resident of the Southern District, in other words, that the jury was not in fact as to all its members a jury from the district in which the offence had been committed. It was held that the defendants' right to such a jury might be waived, and that it had been waived by the failure to raise the objection when the jury was drawn. Two of the defendants in that case presented petitions for certiorari to this Court relying on this point. This Court denied both petitions. *Rosenstein* v. *United States,* 280 U. S.

581; *Levy* v. *United States*, 280 U. S. 602. See also *Kohl* v. *Lehlbach*, 160 U. S. 293, 300–301.

As pointed out in the opinion below, State courts have construed provisions in State constitutions, relating to the place of holding criminal prosecutions, as conferring rights on the accused, which may be waived. *In re Mote*, 98 Kan. 804; *Hourigan* v. *Commonwealth*, 94 Ky. 520; *State* v. *Browning*, 70 S. C. 466; *People* v. *Penn*, 302 Ill. 488; *Kennison* v. *State*, 83 Neb. 391.

Accordingly, we submit that as far as the Federal Constitution is concerned, there is no reason why the right to a trial in the place where the offense was committed may not be waived.

B. *The defendants waived their privilege to be tried at the place where the crime was committed*

The record in this case discloses that after the indictment was returned in the Supreme Court of the District of Columbia, the defendants were arraigned and each pleaded not guilty. (R. 4.) Thereafter they went to trial, and it was not until after verdict, by motion in arrest of judgment, that they raised the question that the indictment did not charge an offense committed in the District of Columbia. (R. 4–5.) We contend that by their failure to object before verdict, the defendants waived the privilege, granted to them by Article III, Section 2, and the Sixth Amendment, to object to the

forum in which they voluntarily proceeded to trial. Even the accused in a criminal case should not be permitted to play fast and loose with the court. He has no constitutional right to speculate upon a favorable verdict and to upset the verdict if it goes against him.

A very similar question was considered by Mr. Justice Story, on Circuit, in *United States* v. *Cornell,* 2 Mason 91 (C. C. R. I.). The defendant was convicted at Providence of a murder committed on United States property at Newport. Section 29 of the Judiciary Act of 1789 (1 Stat. 73, 88) provided that—

> in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that can not be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.

A motion for a new trial was presented on the ground that the defendant had been tried in the wrong county. This motion was overruled. Some doubt existed whether Section 29 of the Judiciary Act was still in effect, but the court held that, even assuming the section remained in full force, the objection had been waived. The following language of Mr. Justice Story is applicable in the present case (pp. 99–100, 101):

> No objection was made by either party to the time or place of trial; and unless upon motion by some party, I do not perceive that

> the Court was bound to order a special session.
>
> * * * * *
>
> The right to a trial in the county where the offence is committed, is a privilege granted to the prisoner. He is not bound to insist upon it, unless he chooses. He may waive it, and require an immediate trial.

See also *Rosenstein* v. *United States,* 34 F. (2d) 630 (C. C. A. 2d), certiorari denied, 280 U. S. 581, discussed on p. 22, *supra.*

Although this Court has not been called upon to consider the precise question now involved, it has determined in numerous decisions that a trial by jury in civil cases may be waived by the parties and that a failure to demand a jury before trial constitutes a waiver of the right. Thus, in *Kearney* v. *Case,* 12 Wall. 275, 284, this Court said—

> we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver.

And in *Duignan* v. *United States,* 274 U. S. 195, 199, this Court held:

> Appellant's failure to demand a trial by a common-law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed.

See also *Phillips* v. *Preston*, 5 How. 278, 290; *Road District* v. *St. Louis S. W. Railway*, 257 U. S. 547, 562.

The objection raised by the defendants in the present case is purely one of venue. The Supreme Court of the District of Columbia is a court of the United States just as much as is the District Court for the Middle District of Pennsylvania. Whether the offense were tried in the District of Columbia or in the Middle District of Pennsylvania, the trial would in either case be of an offense against the United States before a court of the United States. There is no question of trying an offense against one sovereignty in the courts of another sovereignty.

It has been determined in numerous decisions of this Court that in civil cases any objection to the venue is waived by a general appearance of the defendant without more. *Toland* v. *Sprague*, 12 Pet. 300, 330; *Ex parte Schollenberger*, 96 U. S. 369, 378; *Harkness* v. *Hyde*, 98 U. S. 476–479; *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141; *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98; *St. Louis &c. Railway* v. *McBride*, 141 U. S. 127; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *United States* v. *Hvoslef*, 237 U. S. 1, 12; *Camp* v. *Gress*, 250 U. S. 308, 311; *General Investment Co.* v. *Lake Shore Railway*, 260 U. S. 261, 272–273; *Lee* v. *Chesapeake & Ohio Railway*, 260 U. S. 653, 655;

Burnrite Coal Co. v. *Riggs*, 274 U. S. 208, 211–212. These decisions have been made notwithstanding statutes which provide for trial in the proper district in terms far more emphatic than the Constitutional provision granting the defendant the privilege of being tried in the State or district where the offense was committed.[6] We believe that these cases holding that a failure to object to a defect in venue constitutes a waiver of the defect in civil cases are equally applicable to a similar failure to object in criminal cases.

This Court has applied the rule that the failure to object to an error constitutes a waiver in criminal cases as well as civil. In *Queenan* v. *Oklahoma*, 190 U. S. 548, it appeared during the trial of an indictment for murder that one of the jurors had been convicted of a crime and was consequently ineligible. Counsel for the defendant made no objection and the trial continued. This Court not only held that the defendant could waive the defect, but held

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[6] Section 11 of the Act of September 24, 1789, c. 20, 1 Stat. 73, 79, provided that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ * * *." Similar provisions have been carried forward in later statutes involved in the more recent cases cited above.

Section 5198 of the Revised Statutes, involved in *Charlotte Nat. Bank* v. *Morgan*, *supra*, provided for suits against national banks in State courts only in the county in which the bank was located.

that his failure to object constituted a waiver. It said (p. 552) —

> it was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

Similarly, in *Levin* v. *United States*, 5 F. (2d) 598, 600 (C. C. A. 9th), certiorari denied, 269 U. S. 562, it was held that—

> the constitutional immunity from second jeopardy is a personal privilege, which may be waived, that the waiver may be either express or implied, that it is always implied when there is failure to raise the objection at the first opportunity, and that it comes too late when raised for the first time on motion in arrest of judgment.

The same result was reached in *Blair* v. *White*, 24 F. (2d) 323, 324–325 (C. C. A. 8th), in *Brady* v. *United States*, 24 F. (2d) 399, 405 (C. C. A. 8th), and *Callahan* v. *United States*, 35 F. (2d) 633, 634 (C. C. A. 10th). These decisions relating to the Constitutional provision against double jeopardy provided by the Fifth Amendment are equally applicable, we submit, to the Constitutional privilege for trial at the place where the offense was committed provided by the Sixth Amendment and by Article III, Section 2, of the Constitution.

In *Silverberg* v. *United States*, 4 F. (2d) 908 (C. C. A. 5th), certiorari denied, 268 U. S. 706, the court held that objection that a defendant in a criminal

case was tried in the wrong division of a district was waived by failure to raise it before the trial commenced. See also *Au Wee Sheung* v. *United States,* 44 F. (2d) 681, 682 (C. C. A. 7th).

The precise question here involved has been considered by State courts in deciding cases arising under State constitutional provisions for trial of criminal offenses at the place where the crime was committed. In *In re Mote,* 98 Kan. 804, it was held that a defendant's objection to the venue of an indictment was waived by his plea of guilty, although Section 10 of the Kansas Bill of Rights provided that "the accused shall be allowed * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." In *State* v. *Browning,* 70 S. C. 466, it was held that a defect in the venue "was waived when the defendant contested the case upon the merits." Other cases reaching the same result are *Davis* v. *People,* 83 Colo. 295; *State* v. *Pace,* 159 N. C. 462; *State* v. *Bethea,* 88 S. C. 515. See also *Woody* v. *State,* 98 Tex. Crim. 187, 189; *Oborn* v. *State,* 143 Wis. 249.

We do not believe that there is anything in the decisions of this Court in *Thompson* v. *Utah,* 170 U. S. 343, or *Patton* v. *United States,* 281 U. S. 276 which is contrary to this position. In *Thompson* v. *Utah* it was held that the defendant could not through silence waive his right to trial by a constitutional jury of twelve men when a statute of Utah provided for trial before a jury of eight. But as

this Court pointed out in the *Patton* case (p. 293) the defendant in *Thompson* v. *Utah* "had been silent only under constraint of the statute." In the present case there was no constraint of any sort on the defendants. The objection could have been raised before verdict, but they elected to plead to the indictment and to proceed to trial without objection. In the *Patton* case it was said that waiver of trial by jury would be allowed only when "the express and intelligent consent of the defendant" has been obtained. (281 U. S. at 312.) No act of the defendants could have quite so unequivocally waived their right to refuse to be tried in the District as did their proceeding to trial without objection and participating therein until the trial was ended. To voluntarily do that which one may lawfully refuse to do is an express waiver of the right to refuse. All the defendants waived in this case was the asserted right to insist that the charge as laid in the indictment was triable before a jury in the Middle District of Pennsylvania and could not be tried before a jury in the District of Columbia because of the form in which the allegations of the indictment were cast. Surely it is difficult to see how it can be said that such a right is of so high a character that it cannot be waived by joining issue on the indictment and proceeding to trial thereunder in the District of Columbia.

III

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA IN THIS CASE HAD THE SAME JURISDICTION AS A DISTRICT COURT OF THE UNITED STATES AND THERE WAS NO TERRITORIAL LIMITATION UPON ITS JURISDICTION

The petitioners contend that under the Code of the District of Columbia the jurisdiction of the Supreme Court of the District in criminal cases is limited to the trial of crimes and offenses committed within the District. It is contended that Section 44 of Title 18 of the "D. C. Code" (1929) imposes a territorial limitation upon the Supreme Court of the District in criminal cases and, assuming that the petitioners were charged with a crime committed in Pennsylvania, it is said that the Supreme Court of the District was without jurisdiction to try the petitioners and that this want of jurisdiction could not be waived. Of course we concede that if the indictment is to be interpreted as petitioners contend and the Supreme Court of the District was without jurisdiction, that want of jurisdiction was not waived, for it could not be waived. We believe, however, that the petitioners have misapprehended the provisions of the "D. C. Code" to which they refer and that having waived their constitutional privileges for the reasons indicated in Point II of this brief, the Supreme Court had jurisdiction to try this case.

Section 43 of Title 18 of the "D. C. Code" (1929) provides that the Supreme Court of the District "shall possess the same powers and ex-

ercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States." Section 47 of Title 18 of the "D. C. Code" (1929) provides that the justices of the Supreme Court of the District "in addition to the powers and jurisdiction possessed and exercised by them as such, under this chapter, shall severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the district courts of the United States." These provisions clearly make the Supreme Court of the District a court of the United States with all the powers and jurisdiction of a District Court of the United States. In the present case the Supreme Court of the District, engaged in the trial of offenses against the laws of the United States applicable throughout the States as well as the District, possessed the same power and jurisdiction as a District Court of the United States.

The nature of the Supreme Court of the District and its jurisdiction have been considered by this Court in several cases. In *Metropolitan Railroad Co.* v. *Moore,* 121 U. S. 558, this Court said at page 571:

> But the act of March 3, 1863, "to reorganize the courts in the District of Columbia and for other purposes," 12 Stat. 762, was the introduction into the District of Columbia of a new organization of its judicial system. It established a single court, to be called the Supreme Court of the District of

Columbia, having general jurisdiction in law and equity. It gave to that court the same jurisdiction as was then possessed and exercised by the Circuit Court of the District of Columbia, and to the justices of the new court the powers and jurisdiction of the judges of the Circuit Court. It also gave to each of the justices of the court power to hold a District Court of the United States for the District of Columbia, with all the powers and jurisdiction of other District Courts of the United States; and also to hold a Criminal Court for the trial of all crimes and offences arising within the District, with the same powers and jurisdiction as was then possessed and exercised by the Criminal Court of the District of Columbia. All the courts, therefore, previously existing in the District of Columbia, as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new Supreme Court of the District of Columbia. The arrangement of that court, for purposes of convenience, and despatch of business, into general and special terms, was taken from the system long previously established and known in the state of New York in reference to its Supreme Court; and, for the purpose of determining the relation of the special to the general term, the act of Congress of March 3, 1863, adopted the provisions from the legislation of New York incorporated into the sections of the Revised Statutes now under consideration.

In *Benson* v. *Henkel,* 198 U. S. 1, this Court held that the Supreme Court of the District of Columbia was a court of the United States so that a person apprehended in another district could be removed for trial before the Supreme Court of the District as a court of the United States. See also *Hyde* v. *Shine,* 199 U. S. 62. In *Federal Trade Commission* v. *Klesner,* 274 U. S. 145, this Court said at page 153:

> By § 61 of the Code of Laws for the District of Columbia, 31 Stat. 1199, the Supreme Court of the District is given the same powers and the same jurisdiction as district courts of the United States and is to be deemed a court of the United States, and shall exercise all the jurisdiction of one, and a special term of the court shall be a district court of the United States. The justices of the court are vested with the power and jurisdiction of judges of the district courts of the United States. Sections 62 and 84, Code of the District of Columbia, 1924. It follows that the Trade Commission could use the Supreme Court of the District to enforce the procedure needed on its part to take evidence and thus enable it to reach its conclusions, and in this could avail itself of the power of contempt of that court.
>
> It has been the evident intention of Congress that laws generally applicable to enforcement of what may be called federal law in the United States generally should have the same effect within the District of Co-

lumbia as elsewhere. For this purpose the courts of the District of Columbia are federal courts of the United States. *Keller* v. *Potomac Electric Company,* 261 U. S. 428, 442. They are part of the federal judicial system.

In *Hine* v. *Morse,* 218 U. S. 493, 504, this Court said:

> The Supreme Court of the District is one of general jurisdiction. It possesses all of the powers which by statute are conferred upon the Circuit and District Courts of the United States.

In *Swift & Co.* v. *United States,* 276 U. S. 311, this Court said at page 324:

> *First.* At the time the questions were certified, there was a contention that the Supreme Court of the District lacked jurisdiction of the subject matter, because it is not a district court of the United States within the meaning of the Anti-Trust Act. After entry of the case in this Court, that contention was disposed of by *Federal Trade Commission* v. *Klesner,* 274 U. S. 145. Now, it is conceded that the Supreme Court of the District has power to administer relief under the Anti-Trust Act; but the claim is made that in this proceeding it was without jurisdiction, because the petition was addressed to the "Supreme Court of the District of Columbia, sitting in equity," instead of to the special term of that court "as the District Court of the United States." The

> argument has compelled enquiry into legislation affecting the courts of the District, enacted from time to time during a long period. It would not be profitable to discuss the details of the legislation. We are of opinion that this suit under § 4 of the Anti-Trust Act, which could only have been brought in a court of equity, was properly brought in the Supreme Court of the District, sitting in equity. This conclusion has support in established practice in analogous cases.

In *United States* v. *Baltimore & O. R. Co.*, 26 App. D. C. 581, after considering the several sections of the Code of the District relating to the jurisdiction of the Supreme Court of the District, the Court of Appeals said, at page 588:

> Thus, the supreme court of the District of Columbia was made by Congress a depository of the powers of Federal and State courts combined, and therefore, while it was given all the powers of a district court of the United States, the supreme court's special term, known as the "circuit court," also became the depository of its power over all common-law civil actions such as the circuit court in the State of Maryland tried and determined, and also over all common-law civil actions such as a district court of the United States could try and determine.

In *Arnstein* v. *United States*, 296 Fed. 946 (App. D. C.), the court said, at page 948:

> Section 340 of the Penal Code of the United States (Comp. St. §10514) provides

> that the offense denounced by section 37 thereof shall be cognizable in the Circuit and District Courts of the United States. The Supreme Court of the District of Columbia is a District Court of the United States, within the meaning of section 340. *Benson* v. *Henkel,* 198 U. S. 1, 13; *United States* v. *Morse,* 218 U. S. 493, 504. Hence jurisdiction of the case was vested by law in the Supreme Court of the District of Columbia.

In *Pitts* v. *Peak,* 50 F. (2d) 485 (App. D. C.), certiorari denied, October 19, 1931, the court said at page 486:

> But it is contended that because it is not specifically made an offense under the laws of the District, an indictment under it must be tried in a District Court of the United States, and that since, under the provisions of the District law, Section 56, Title 18, D. C. Code 1929, providing for special terms of the Supreme Court, one of said terms is designated as "the district court of the United States," and by the Act of April 19, 1920 (Section 347, Title 18, D. C. Code 1929) Congress has provided for the drawing of petit jurors for service in the various special terms, including inferentially said term as district court of the United States, the trial of petitioner should have been had in a court so designated rather than in the Supreme District Court of the United States, the trial special term as a criminal court, but we regard this as a play upon words, for, first of

all, it overlooks section 58 of Title 18, wherein it is provided that the several terms "are declared to be terms of the supreme court," and more particularly section 81 of Title 18 which specifically provides that the trial of crimes and misdemeanors committed in the District shall be had in the Supreme Court holding a special term as a criminal court, and this we think means all crimes, and so we have already had occasion to hold in Arnestein v. U. S., 54 App. D. C. 199, 201, that offenses made such by a law of the United States, and which by their terms are not inapplicable in the District of Columbia, are triable in the Supreme Court of the District though by the terms of the act creating the offense it is made triable in a district court of the United States, and this not only because the statute so declares but because the Supreme Court of the District as such possesses all the powers and exercises all the authority conferred by acts of Congress on the District Courts of the United States. The Supreme Court of the District is a court of the United States (Sec. 43, Title 18, D. C. Code 1929) for the administration of the laws of the United States.

Thus, it appears that in this case the Supreme Court of the District of Columbia had all the powers and exercised the same jurisdiction as a District Court of the United States.

As a District Court of the United States it possessed and exercised under Section 24 (2) of the

Judicial Code (U. S. C., Title 28, Sec. 41(2)) original jurisdiction "of all crimes and offenses cognizable under the authority of the United States" in so far as cases such as the instant case are concerned, and the only territorial limitations upon the exercise of this power are found in the provisions of Article III, Section 2 of the Constitution and of the Sixth Amendment referred to in Part II of this brief. As we have shown, these constitutional provisions are not jurisdictional but merely confer personal privileges which may be waived.

The petitioners, however, contend that this power and jurisdiction, exercised by the District Court of the District of Columbia as a District Court of the United States, is subject to an express limitation found in the "D. C. Code" (Sec. 44) which can have no application to a District Court of the United States sitting in any other district. This contention seems to us to be quite inconsistent with the clear grant of the *same* powers, and the *same* jurisdiction, as are possessed by the District Courts of the United States ("D. C. Code," Sec. 43), and is not borne out by the legislative antecedents of the Code, which is a mere codification of prior statutes having no independent statutory authority. Like the United States Code, its effect is merely *prima facie*. (Acts of May 29, 1928, 45 Stat. 1007, c. 910, Sec. 4; March 2, 1929, 45 Stat. 1540, 1541, c. 586, Sec. 3.)

This codification, so far as Sections 43 and 44 are concerned, is entirely dependent for its authority upon the existing Code of Laws of the District of Columbia (Act of March 3, 1901, 31 Stat. 1189, as amended; *infra*, pp. 45–47), which defined the jurisdiction and powers of the Supreme Court of the District of Columbia. In Section 61 of this statute it was expressly provided that—

> The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the supreme court of the District of Columbia at the date of the passage of this code.

That part of Section 61 down to and including the words "shall be deemed a court of the United States" was carried into Section 43 of Title 18 of the "D. C. Code." The succeeding provision "and shall also have and exercise all the jurisdiction possessed and exercised by the supreme court of the District of Columbia at the date of the passage of this code" appears to have been eliminated in the 1929 codification. Looking to the prior statutes for a definition of the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia, in addition to its possession and exercise of the jurisdiction and powers of Circuit and District Courts, the codifiers quite properly attempted

in Section 44 to define this jurisdiction, of a character purely local to the District of Columbia, which takes the place of that part of Section 61 referred to above which was eliminated in the codification. Thus, it is apparent that Section 44 of Title 18 of the 1929 codification, having no statutory sanction other than as *prima facie* evidence of existing law, can not be regarded as a limitation upon the powers and jurisdiction possessed by the Supreme Court of the District of Columbia as "a court of the United States."

The conclusion that Section 44 of the "D. C. Code" can not be regarded as in limitation of the jurisdiction which the Supreme Court of the District possesses as a court of the United States is reinforced by reference to other provisions of the Code of Laws (1901) upon which this codification (1929) finds its only support. Thus, in Sections 63 and 64 the terms of the court are designated, and among these terms are found "the criminal court" and "the district court of the United States." (Sec. 64; *infra*, p. 46.) It is provided in Section 83 (*infra*, p. 47) "The trial of crimes and misdemeanors committed in the District of Columbia shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court," except misdeameanors within the jurisdiction of the Court of Appeals. And then, in Section 84, it is provided:

> The said District Court [i. e., of the United States; see Sec. 64] shall have and exercise the same powers and jurisdiction as the other district courts of the United States, and such further special jurisdiction as may from time to time be conferred by Congress, and of all proceedings instituted in exercise of the right of eminent domain.

Thus, in two places, when the statute speaks of the powers of the court as a court of the United States, it specifically and expressly provides that its power and jurisdiction shall be the same as that possessed by the other District Courts of the United States. No limitation is expressed, and none can be implied in the face of such provisions.

The error in the petitioners' contention is that they rely on certain provisions of the "D. C. Code" (1929), a compilation which has no statutory authority. The applicable statutory provisions are the sections of the Code of Laws of the District of Columbia, enacted in 1901, and still in force without change, which are set out and discussed above. These provisions, together with repeated declarations of this Court, we submit, make it plain that the Supreme Court of the District of Columbia possesses the same power and authority as a district court of the United States, and that the Supreme Court of the District had authority as a court of the United States to conduct the trial at which the petitioners were convicted.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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MARCH, 1932.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

Article III, Section 2, Clause 3, of the Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Ninth Amendment to the Constitution provides as follows:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Section 1025 of the Revised Statutes (U. S. C., Title 18, Sec. 556) provides as follows:

> SEC. 1025. No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

The Code of Laws of the District of Columbia (Act of March 3, 1901, c. 854, 31 Stat. 1189, 1199, 1200, 1202) provides in part as follows:

> SECTION 1. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.
>
> * * * * *
>
> SEC. 60. CONSTITUTION.—The supreme court of the District shall continue as at present constituted, and consist of a chief justice and five associate justices, appointed by the President of the United States, by and with the advice and consent of the Senate, and holding their offices during good behavior. The chief justice and each associ-

ate justice shall receive a salary of five thousand dollars per annum, which amounts shall be paid in monthly installments, out of the Treasury of the United States, and one-half thereof shall be charged against the revenues of the District of Columbia.

SEC. 61. JURISDICTION.—The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the supreme court of the District of Columbia at the date of the passage of this code.

SEC. 62. POWERS OF JUSTICES.—The justices of said court, in addition to the powers and jurisdiction possessed and exercised by them as such, shall severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the circuit and district courts of the United States.

SEC. 63. TERMS.—The said court shall hold a general term and special terms. The general term shall be held by at least three justices and each special term by a single justice.

SEC. 64. The special terms of said court shall be known, respectively, as the circuit court, the equity court, the criminal court, the probate court, and the district court of the United States.

* * * * *

SEC. 66. All causes in said court shall be heard and determined in special term. And the several terms are declared to be terms of the supreme court, and the judgments, decrees, sentences, orders, proceedings, and acts of said several terms shall be deemed

judgments, decrees, sentences, orders, proceedings, and acts of the supreme court.

* * * * *

SEC. 83. THE CRIMINAL COURT.—The trial of crimes and misdemeanors committed in the District of Columbia shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court, except such misdemeanors as are within the jurisdiction of the police court, as to which said court shall have concurrent jurisdiction with said police court. In all trials in said special term exceptions may be taken by the accused to the rulings of the presiding justice and presented in bills of exceptions in the same manner as in the trial of civil cases, subject to provisions herein elsewhere contained.

The Act of June 30, 1902, 32 Stat. 520, 522, 523 ("An Act To amend an Act entitled 'An Act to establish a code of law for the District of Columbia' ") provides in part as follows:

Amend section 61 by inserting in the fifth line thereof, after the words "District of Columbia," the words "under the Act of Congress approved March third, eighteen hundred and sixty-three, creating that court, and."

Amend section 62 by inserting in the second line thereof, after the word "such," the words "under said Act of March third, eighteen hundred and sixty-three, and at the date of the adoption of this code."

* * * * *

Amend section 83 by striking out at the end thereof the words "subject to provisions herein elsewhere contained."

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338) provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United

States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

The Act of February 26, 1919, c. 48, 40 Stat. 1181 (U. S. C., Title 28, Sec. 391), provides as follows:

That section two hundred and sixty-nine of the Act approved March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended so as to read as follows:

"SEC. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 590.—October Term, 1931.

Herman O. Hagner and Julia C. Hagner, Petitioners,
vs.
The United States of America.
} On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[April 11, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioners were indicted in the Supreme Court of the District of Columbia under § 215 of the Criminal Code, U. S. C., Title 18, § 338, which provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . in any post-office, . . . to be sent or delivered by the post-office establishment of the United States, . . . *or shall knowingly cause to be delivered by mail according to the direction thereon,* . . . any such letter, . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The indictment charges that petitioners devised and intended to devise a scheme and artifice to defraud the Merchants' Transfer and Storage Company out of its money and property in manner and form set forth; and that "for the purpose of executing said scheme and artifice, on, to wit, April 19, 1927, did place and cause to be placed in the Post Office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N. W., Washington, D. C."

Petitioners were arraigned, entered pleas of not guilty, and went to trial without challenging the sufficiency of the indictment or the jurisdiction of the court to hear and determine the case. They were found guilty by a jury, and thereupon moved in arrest of judgment upon the ground that the indictment failed to charge any offense within the jurisdiction of the court. The motion was overruled, and petitioners sentenced to pay a fine and undergo a term of imprisonment. Upon appeal the judgment was affirmed by the court below. 54 F. (2d) 446.

The contention is that the indictment charges no offense committed in the District of Columbia, but only an offense committed in Pennsylvania; and, assuming this to be true, that the Supreme Court of the District of Columbia was without jurisdiction. Undoubtedly, the indictment is adequate to charge an offense committed in Pennsylvania; but the question first to be considered is whether upon this record and upon a motion in arrest of judgment, the indictment may be sustained as also sufficient to charge an offense committed within the District of Columbia. The record brought here does not contain the evidence or any of the trial proceedings. We have before us only the indictment, the fact that petitioners were arraigned, entered pleas, were convicted and sentenced, the motion in arrest of judgment and the order of the court overruling it, together with the formal docket entries relating thereto.

The defect said to exist is that the indictment fails to allege specifically that petitioners did "cause [the letter] to be delivered by mail according to the direction thereon." Obviously, in this particular, the indictment does not precisely follow the terms of the statute, but it does allege that the letter was deposited in a post-office so addressed as to constitute a direction for its delivery to the addressee at a particular place in the District of Columbia. The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Rosenthal* v. *Walker,* 111 U. S. 185, 193. And the fact that receipt of the letter subjects the person sending it to a penalty does not alter the rule. *Id.,* p. 194. If the indictment had alleged actual delivery of the letter in question, the case for the government in this particular would have been made out by proof that the letter thus directed had been placed in the post office for transmission. The burden then would have been cast upon petitioners to show the contrary.

While, therefore, the indictment does not in set terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged. In *Ball* v. *United States,* 140 U. S. 118, 133, 136, it was held that an indictment for murder which fails to allege the time of the death is fatally defective, since to constitute murder it is necessary that death shall occur within a year and a day from the time of the fatal stroke. But it appearing that the indictment then under consideration had been returned less than a year from the day of the assault, the court did not con-

sider the objection fatal to the indictment in this particular, notwithstanding the absence of an allegation of the time of death.

The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34.

Section 1025 Revised Statutes (U. S. C. Title 18, § 556) provides:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading. We refer to a few of the many cases where the provision has been applied.

In *Grandi* v. *United States*, 262 Fed. 123, 124, the indictment charged the defendant with the receipt and possession of goods, knowing they had been stolen from part of a shipment in interstate commerce, but failed to charge that the goods were in fact so stolen. A motion to quash had been denied, on the ground that the defendant could not have been misled to his prejudice. The court said—"The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial." An indictment under the Espionage Act, which denounces certain acts when the United States is at war, has been upheld notwithstanding a failure to allege that when the acts were committed the United States was at war, on the ground that the courts would take judicial notice of that fact. *Stephens* v. *United States*, 261 Fed. 590; *Bouldin* v. *United States*, 261 Fed. 674. An indictment for seditious conspiracy under Section 6 of the Criminal Code must charge that

the conspiracy involved an intent to use force; but where the overt act was alleged, with the intent of engaging in armed hostility against the United States by attacking with force and arms, the original intent was necessarily implied and the indictment was sustained notwithstanding the lack of the specific allegation, since otherwise effect, fatal to the indictment, would be given to a mere imperfection in matter of form, not tending to the prejudice of the defendant. *Phipps* v. *United States*, 251 Fed. 879, 880. Omission from an indictment, drawn under the section of the Criminal Code now under consideration, of a specific allegation that the letter was "to be sent or delivered by the post office establishment" was not considered prejudicial where the indictment sufficiently alleged that the letter was placed in the post office properly addressed. *Olsen* v. *United States*, 287 Fed. 85, 90. See also *Cohen* v. *United States*, 294 Fed. 488, 490; *Gay* v. *United States*, 12 F. (2d) 433, 434; *Musey* v. *United States*, 37 F. (2d) 673, 674.

It, of course, is not the intent of § 1025 to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.

In the absence of the evidence and the charge of the court, we are free to assume that every essential element of the offense was sufficiently proved and that the question as to the delivery of the letter was submitted under appropriate instructions to the jury. The contrary of neither of these propositions is asserted. The indictment in the particular complained of is loosely and inartificially drawn and is not to be commended, but upon the record before us, and without deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case, we are of opinion that after verdict it is not vulnerable to the attack here made upon it. *Dunbar* v. *United States*, 156 U. S. 185, 191 *et seq.* Compare *Pierce* v. *Creecy*, 210 U. S. 387, 401-2; *Ex parte Pierce*, 155 Fed. 663, 665; *United States* v. *Barber*, 157 Fed. 889, 891.

In view of this conclusion, it becomes unnecessary to consider the further question whether the trial court had jurisdiction to try the indictment, if construed as charging the commission of an offense only in Pennsylvania.

Judgment affirmed.